(18)

No. 90-693-CFX
Status: GRANTED

Title: Curtis Reed Johnson, Petitioner
v.
Home State Bank

Docketed:
October 26, 1990

Court: United States Court of Appeals
for the Tenth Circuit

Counsel for petitioner: Gilman,W. Thomas

Counsel for respondent: Rider,Calvin D.

Docket fee recd. 10/30.

Entry	Date	Note	Proceedings and Orders
1	Oct 26 1990	G	Petition for writ of certiorari filed.
2	Nov 23 1990		Brief of respondent Home State Bank in opposition filed.
3	Jan 2 1991		DISTRIBUTED. January 18, 1991
4	Jan 11 1991	X	Supplemental brief of petitioner Curtis Reed Johnson filed.
5	Jan 17 1991	X	Supplemental brief of respondent Home State Bank filed.
6	Jan 22 1991		Petition GRANTED.
			**
7	Feb 21 1991		Record filed.
		*	Certified copy of original record on appeal and proceedings, Volumes I - III and A & B received.
8	Feb 21 1991		Brief of petitioner Curtis Reed Johnson filed.
9	Feb 27 1991		SET FOR ARGUMENT TUESDAY, APRIL 16, 1991. (2ND CASE)
10	Mar 8 1991	X	Brief amicus curiae of Consumers Education and Protective Assn., et al. filed.
11	Mar 8 1991		Joint appendix filed.
12	Mar 22 1991		CIRCULATED.
13	Mar 22 1991	X	Brief amicus curiae of Kansas Bankers Association filed.
14	Mar 27 1991	X	Brief amicus curiae of American Bankers Association filed.
15	Mar 27 1991	X	Brief of respondent Home State Bank filed.
16	Apr 5 1991	X	Reply brief of petitioner Curtis Reed Johnson filed.
17	Apr 16 1991		ARGUED.

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90-6 93 ①

No. ________

In The

Supreme Court of the United States

October Term, 1990

CURTIS REED JOHNSON,

Petitioner,

vs.

HOME STATE BANK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR CERTIORARI

*W. THOMAS GILMAN
EDWARD J. NAZAR
THOMAS E. MALONE
MARTIN R. UFFORD
J. FRANCIS HESSE
PATRICIA A. GILMAN
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A. QUESTION PRESENTED FOR REVIEW

Do the terms "debt" and "claim" as defined at 11 U.S.C. §101(11) and 11 U.S.C. §101(4), respectively, encompass an *in rem* liability which encumbers a debtor's property and remains due after the discharge in a prior bankruptcy of the debtor's *in personam* liability of a secured debt?

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PETITION FOR CERTIORARI

D. OPINIONS OF COURTS BELOW

1. *In Re Johnson*, 904 F.2d 563 (10th Cir. 1990).
2. *In Re Johnson*, 96 B.R. 326 (D.Kan. 1989).
3. *In Re Johnson*, Case No. 87-10585, Slip Op. (Bankr. D.Kan. Apr. 8, 1988).

E. JURISDICTION

The Tenth Circuit Court of Appeals entered its judgment on June 7, 1990. A petition for rehearing with suggestion for rehearing *en banc* was denied on August 1, 1990. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

F. STATUTES INVOLVED

1. 11 U.S.C. §101(11): "debt" means liability on a claim.

2. 11 U.S.C. §101(4): "claim" means –

   (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

   (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

3. 11 U.S.C. §102(2): "claim against the debtor" includes claim against property of the debtor.

G. STATEMENT OF THE CASE

Introduction

The Petitioner (hereinafter "Johnson") filed a Chapter 13 bankruptcy seeking to amortize an *in rem* liability that remained due after his discharge in a prior Chapter 7 bankruptcy of the *in personam* portion of the liability owed by Johnson to the Respondent (hereinafter "Bank") in connection with a mortgage loan made by the Bank to Johnson. The Bankruptcy Court confirmed Johnson's amended Chapter 13 plan, the District court reversed the Bankruptcy Court, and the Tenth Circuit Court of Appeals affirmed the District Court. The Bankruptcy Court was conferred with federal jurisdiction by 28 U.S.C. §1334 and 28 U.S.C. §157.

Background

[1]On May 1, 1978, Johnson and his wife ("the Johnsons") executed a promissory note in the amount of $165,000 in favor of Traveler's Insurance Company ("Travelers"). The note was secured by a first mortgage on two quarter sections of land in Edwards County, Kansas.

On June 2, 1978, the Johnsons executed a promissory note in the amount of $100,000 to the Bank. The Johnsons gave the Bank a second mortgage on the same two quarter sections of land to secure the Bank's loan.

[1] Petitioner here draws liberally from the facts recited by the District Court in its opinion. *In Re Johnson*, 96 B.R. at 326-328.

On February 25, 1983, the Johnsons executed another loan agreement with the Bank and borrowed $370,000. The loan was secured by various personal property and the 1978 real estate mortgage in the amount of $100,000.

The Johnsons defaulted on their notes with the Bank and on March 23, 1984, the Bank filed a foreclosure action in the Edwards County, Kansas District Court. On October 9, 1984, the Johnsons filed their joint Chapter 7 bankruptcy. On April 11, 1985, the Bankruptcy Court discharged the Johnsons from all dischargeable debts. Prior thereto, the Bankruptcy Court granted the Bank relief from the automatic stay to proceed with its foreclosure action previously filed in the Edwards County, Kansas District Court.

On October 9, 1985, the Edwards County District Court granted summary judgment in favor of the Bank. The court found the Bank was entitled to foreclose its June 2, 1978 mortgage and have the property sold, subject only to Travelers' first mortgage, to all oil and gas leases of record, and to the Johnsons' right to redeem the property. The property was sold at sheriff's sale for $473,013.41, which represented the combined bids of Travelers ($134,083.00) and the Bank ($337,172.45) and the additional sum of $1,757.96 for taxes.

On December 4, 1985, the Johnsons filed their notice of appeal from the Edwards County judgment. The appeal was transferred to the Kansas Supreme Court. Sometime prior to the Kansas Supreme Court's decision, the Bank purchased the first mortgage of Travelers and thereby became the holder of both mortgages.

On December 11, 1986, the Kansas Supreme Court reversed and remanded the case to the Edwards County, Kansas District Court with directions to set aside the sheriff's sale and deed, and for further proceedings in conformity with the opinion. *Home State Bank v. Johnson*, 240 Kan. 417, 729 P.2d 1225 (1986). The Court held, *inter alia*, that when a trial court enters an order of foreclosure *in rem* against mortgaged land, it is error for the Court to fail to determine and state the amount of the judgment which is being entered against the land.

On remand, the district court granted the Bank judgment on its second mortgage *in rem* in the principal amount of $100,000, plus accumulated interest. The court also found that the balance due on the first mortgage purchased by the Bank from Travelers amounted to $100,447.22. Further, the court granted the Bank an *in rem* judgment in the amount of $1,757.96 for taxes paid by the Bank. Finally, the court entered an order of sale specifying the property be sold by the sheriff on April 3, 1987.

On March 2, 1987, Johnson filed his Chapter 13 bankruptcy. Johnson listed the Bank as a partially secured creditor based on the value of the land and the amount of the *in rem* judgment against it. In his plan, Johnson proposed to pay the Bank the value of the land, with interest, over five years and treated the amount due on the Bank's *in rem* liability in excess of the value of the land as an unsecured claim. (See 11 U.S.C. §506(a)).

The Bank objected to Johnson's Chapter 13 plan contending, in part, that the debtor had improperly scheduled a debt which had previously been discharged in the Johnsons' Chapter 7 bankruptcy. The Bankruptcy Court

confirmed Johnson's amended plan over the Bank's objection. The District Court reversed the Bankruptcy Court and the Tenth Circuit Court of Appeals affirmed the District Court.

H. REASONS FOR GRANTING THE WRIT

The decision of the Tenth Circuit Court of Appeals is in direct conflict with the decisions of two other circuit courts of appeals and several federal district courts and bankruptcy courts[2], and is contrary to a prior decision of this Court.[3]

The Tenth Circuit Court of Appeals held "that a debtor's Chapter 13 plan cannot be confirmed where it improperly schedules a debt previously discharged under Chapter 7. . . . " *Johnson*, 904 F.2d at 566. The Court's rationale was that because Johnson had discharged the *in personam* portion of the liability in a prior Chapter 7

[2] See, *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989); *In Re Metz*, 820 F.2d 1495 (9th Cir. 1987); *Grundy Nat. Bank v. Johnson*, 106 B.R. 95 (W.D.Va. 1989); *In Re Ligon*, 97 B.R. 398 (Bankr. N.D.Ill. 1989); *In Re Smith*, 94 B.R. 216 (Bankr. M.D.Ga. 1988); *In Re Hagberg*, 92 B.R. 809 (Bankr. W.D.Wis. 1988); *In Re Klapp*, 80 B.R. 540 (Bankr. W.D.Okla. 1987); *In Re Lagasse*, 66 B.R. 41 (Bankr. D.Conn. 1986); *In Re Lewis*, 63 B.R. 90 (Bankr. E.D.Pa. 1986). **But see the following cases holding contra:** *In Re Reyes*, 59 B.R. 301 (Bankr. S.D.Cal. 1986) (effectively overruled by *In Re Metz, supra*); *In Re McKinstry*, 56 B.R. 191 (Bankr. D.Vt. 1986); *In Re Binford*, 53 B.R. 307 (Bankr. W.D.Ky. 1985); *In Re Brown*, 52 B.R. 6 (Bankr. S.D.Ohio 1985).

[3] *Pennsylvania Department of Public Welfare v. Davenport*, ___ U.S. ___, 110 Sup. Ct. 2126, 109 L.Ed.2d 588 (1990).

bankruptcy, the remaining *in rem* liability against property owned by Johnson does not constitute a "debt" as defined by 11 U.S.C. §101(11). The decisions in *In Re Metz*, 820 F.2d 1495 (9th Cir. 1987) and *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989) hold exactly the opposite. Thus, the holding below creates a rule of law that deprives people subject to the Tenth Judicial Circuit's jurisdiction of a type of relief in bankruptcy which is expressly available to other people subject to the jurisdiction of the Ninth and Eleventh Judicial Circuits.[4]

Further, the Tenth Circuit's decision departs from this Court's recent decision in *Pennsylvania Department of Public Welfare v. Davenport*, ___ U.S. ___, 110 Sup. Ct. 2126, 109 L.Ed.2d 588 (1990), which recognized the "expansive language" Congress used in defining "debt" and "claim." *Id.* at 110 Sup. Ct. 2130, 109 L.Ed.2d 596. The decision glosses over the clear language of 11 U.S.C. §102(2) and ignores "the fundamental canon that statutory interpretation begins with the language of the statute itself." *Id.* at 110 Sup. Ct. 2130, 109 L.Ed.2d 595. In both *In Re Metz*, 820 F.2d 1495 (9th Cir. 1987) and *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989), the courts recognized that the clear

[4] The Tenth Circuit incorrectly states in its opinion that *In Re Metz*, 820 F.2d 1495 (9th Cir. 1987) is the only circuit court decision that has decided the issue presented here (904 F.2d at 565) even though Johnson advised the Court of *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989) in a supplementary letter submitted to the Court pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, at oral argument, and in Johnson's Motion for Rehearing and Suggestion for Rehearing *En Banc*.

language of the applicable statutes allows for a "claim" to be based on an encumbrance against the debtor's property with no associated *in personam* liability.[5] In the case below, however, the court rejects the clear language of 11 U.S.C. §102(2) and bases its decision on the statute's legislative history[6], ironically, the same legislative history other courts have relied upon to hold to the contrary.[7]

Further, in construing the definition of "claim" at 11 U.S.C. §101(4) and paragraphs (A) and (B) of that definition pertaining to a "right to payment," the Court in the case below expanded the language of the definition by adding another element to the definition – that the right to payment must be *from the debtor.*[8] However, the statute

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[5] See, *In Re Metz,* 820 F.2d at 1498 and *In Re Saylors,* 869 F.2d at 1436.

[6] *In Re Johnson,* 904 F.2d at 565-66.

[7] Compare *In Re Johnson,* 904 F.2d at 565-66, with *In Re Saylors,* 869 F.2d at 1436.

[8] The Court below states as follows: "Although the Bank has a right to an equitable remedy in the form of a state court foreclosure proceeding because Johnson breached performance on his promissory note, that right does not give rise to a 'right to payment.' The Bank no longer has a right to receive payment from Johnson due to his breach because Johnson obtained a discharge from personal liability under Chapter 7. Thus the Bank has no *right to payment from Johnson,* either directly or indirectly through a mortgage foreclosure action in state court. Accordingly, the Bank has no 'claim' as defined in either paragraph (A) or paragraph (B) of §101(4)." 904 F.2d at 566. (Emphasis original)

does not require the right to payment to be *from the debtor;* it simply requires that there be a right to payment.[9]

I. CONCLUSION

For the foregoing reasons, we respectfully request that this Petition for Writ of Certiorari be granted and that the decision of the Court below be reversed.

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[9] In *In Re Ligon,* 97 B.R. 398, 403 (Bankr. N.D.Ill. 1989), the court states as follows: "[The mortgagee] has a right to payment resulting from the failure to make mortgage payments. Its right is to be paid from the proceeds of the foreclosure sale. Nothing in 11 U.S.C. in §101(4)(A) or (B) requires a right to payment from the debtor personally. The fact that the payment comes from the debtor's property as opposed to the debtor personally would seem to be irrelevant, a conclusion reinforced by 11 U.S.C. §102(2)."

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

In re: CURTIS REED JOHNSON, Debtor.	
HOME STATE BANK OF LEWIS, LEWIS, KANSAS, Appellee and Cross-Appellant, v. CURTIS REED JOHNSON, Appellant and Cross-Appellee.	Nos. 89-3029 and 89-3031

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (D.C. No. 88-1270-K)

W. Thomas Gilman of Redmond, Redmond & Nazar, Wichita, Kansas, for Appellant and Cross-Appellee.

Calvin D. Rider (Dennis E. Shay with him on the briefs) of Smith, Shay, Farmer & Wetta, Wichita, Kansas, for Appellee and Cross-Appellant.

Royce E. Wallace of Wallace & Zimmerman, Wichita, Kansas, for Amicus Curiae Royce E. Wallace, Standing Chapter 13 Trustee.

Patricia A. Reeder of Eidson, Lewis, Porter & Haynes, Topeka, Kansas, for Amicus Curiae Kansas Bankers Association.

Before **BRORBY,** Circuit Judge, **BARRETT,** Senior Circuit Judge, and **WEST,*** District Judge.

BRORBY, Circuit Judge.

Curtis Reed Johnson, Debtor, appeals from the reversal by the United States District Court for the District of Kansas of the Bankruptcy Court's confirmation of Johnson's Chapter 13 Plan. The facts are thoroughly presented in the district court's opinion, *In re Johnson*, 96 Bankr. 326 (Bankr. D. Kan. 1989). Basically, the Johnsons defaulted on two notes with Home State Bank (the Bank), which were secured by mortgages on two quarter sections of land farmed by the Johnsons. The Bank instituted foreclosure proceedings, and the Johnsons filed a joint Chapter 7 petition in bankruptcy court. The Johnsons were subsequently discharged of all dischargeable debts, and the state court then granted summary judgment in the Bank's favor, holding the Bank was entitled to foreclose on its mortgage and have the property sold. While foreclosure proceedings were pending, and one month before the property was scheduled to be sold by the sheriff, Curtis Johnson filed his voluntary Chapter 13 petition in bankruptcy. His Chapter 13 plan listed the Bank as a partially secured creditor, and the Bank filed an objection to confirmation of the plan. The bankruptcy court subsequently confirmed an amended plan submitted by Johnson, which proposed five annual payments to the Bank

* The Honorable Lee R. West, United States District Judge for the Western District of Oklahoma, sitting by designation.

and a final balloon payment at the conclusion of the five-year plan. The district court reversed, concluding that Johnson's Chapter 13 plan could not be confirmed because it improperly scheduled a debt previously discharged under Chapter 7. 96 Bankr. at 330. Having so concluded, the court did not reach other issues raised by the Bank, i.e., that the Debtor lacked good faith and that the plan is infeasible. The Bank reasserts these issues in its cross-appeal to this court.

The fundamental issue presented by this case is whether a debtor who has been discharged from in personam liability on a secured debt may then reschedule that debt in a Chapter 13 proceeding under the Bankruptcy Code. This is an issue of law which we review de novo. As the district court found, the majority of courts that have considered this issue have answered it in the negative. 96 Bankr. at 329. *See, e.g., In re Reyes*, 59 Bankr. 301, 302 (Bankr. S.D. Cal. 1986); *In re McKinstry*, 56 Bankr. 191, 193 (Bankr. D. Vt. 1986); *In re Binford*, 53 Bankr. 307, 309 (Bankr. W.D. Ky. 1985); *In re Brown*, 52 Bankr. 6, 7 (Bankr. S.D. Ohio 1985). More recently, several courts have reached the opposite result, concluding that a debtor may, through a Chapter 13 plan, cure a default on a mortgage debt previously discharged under Chapter 7. *See, e.g., In re Metz*, 820 F.2d 1495, 1498 (9th Cir. 1987); *In re Ligon*, 97 Bankr. 398, 403 (Bankr. N.D. Ill. 1989); *In re Hagberg*, 92 Bankr. 809, 814-16 (Bankr. W.D. Wis. 1988); *In re Klapp*, 80 Bankr. 540, 542 (Bankr. W.D. Okla. 1987); *In re Lagasse*, 66 Bankr. 41, 43 (Bankr. D. Conn. 1986); *In re Lewis*, 63 Bankr. 90, 90 (Bankr. E.D. Pa. 1986). *Metz*, the only circuit court to have decided this issue, holds that "a chapter 13 petitioner may include a mortgage claim

within a plan even though the underlying obligation of the mortgage was discharged in the debtors' prior bankruptcy case." 820 F.2d at 1498.

We disagree that the *Metz* approach is the preferred method of dealing with so-called "Chapter 20" bankruptcy filings. The *Metz* panel provides little explanation of its decision. Although it cites the rationales of the *Lagasse* and *Lewis* courts, it does not analyze or expressly adopt either. The panel merely concludes: "We find no statutory prohibition to such a practice [i.e., "Chapter 20 filings"] except the good faith filing requirement of [11 U.S.C. § 1325(a)(3)]." 820 F.2d at 1498.

Lagasse, which *Metz* cites, holds that Chapter 13 scheduling of a debt discharged under Chapter 7 is permissible, on the ground that when a debtor receives a Chapter 7 discharge of a secured debt, the debt relationship between the debtor and the secured party is converted to a nonrecourse obligation. 66 Bankr. at 43. *Lewis* reasons that, "under chapter 13, a creditor's 'claim' includes not only a right to payment but also the right to an equitable remedy for breach of performance. Therefore, 'a claim may include a creditor's encumbrance against property of the estate although there is no in personam liability against the debtor.' " *Metz,* 820 F.2d at 1498 (quoting *Lewis,* 63 Bankr. at 91-92). Based on these opinions, the *Metz* panel concludes that the only test a Chapter 13 plan must meet is whether it was submitted in "good faith," which is judged by the "totality of the circumstances." 820 F.2d at 1498. We reject this "gestalt approach to the good faith inquiry," *In re Hagberg,* 92 Bankr. at 815, and hold that the majority approach to "Chapter 20" filings is the better one.

While it is true that the Bankruptcy Code does not expressly prohibit what the debtor sought to do in this case, we do not believe Congress intended such a result. As the district court held,[1] where a mortgage obligation has been discharged under Chapter 7, the mortgagee no longer holds a claim against the debtor, but only a lien against the debtor's property. 96 Bankr. 329-30. That lien is "not accompanied by any obligation, note, debt, or right to payment." Accordingly, Home State Bank is not a "creditor" of Johnson and holds no claim that can be scheduled in Johnson's Chapter 13 plan.

We acknowledge the Code's rule of construction, which states that " 'claim against the debtor' includes claim against property of the debtor," 11 U.S.C. § 102(2), but reject the argument that the Bank's lien against the Johnson property, which survived Johnson's Chapter 7 proceeding, is a "claim against the debtor" that can be scheduled in a Chapter 13 plan. In reaching this conclusion we rely in part on the explanation of the Senate Committee on the Judiciary that § 102(2) "is intended to cover nonrecourse loan agreements where the creditor's only rights are against property of the debtor, and not against the debtor personally. Thus, such an agreement would give rise to a claim that would be treated as a claim against the debtor personally. . . . " S. Rep. No. 989,

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[1] In the following discussion, we borrow liberally from the district court's thorough opinion. We also note and correct one minor inadvertent error in the district court's opinion. At 96 Bankr. 328, the court states: "[T]he *in rem* liability of the property held as security remains unaffected and unenforceable by the mortgagee after discharge." This sentence should read "unaffected and *enforceable.*"

95th Cong., 2d Sess. 28 (1978). Here there clearly was no "agreement" between Johnson and Home State Bank for a nonrecourse mortgage loan. For this reason, we find the *Lagasse* and *Ligon* courts' analogy to nonrecourse loans inapt.

On its face, the *Ligon* court's treatment of the nonrecourse loan analogy is thorough, *see* 97 Bankr. at 402-03, but it overlooks the significance of the legislative history of § 102(2). Even though the court recognized there is no agreement for a nonrecourse loan in these cases, *id.* at 402, it nevertheless construes § 102(2) as providing that a mortgagee's lien is a debt for Bankruptcy Code purposes. *Ligon* faults courts adhering to the majority view for "ignor[ing] or gloss[ing] over the existence of 11 U.S.C. § 102(2)." *Id.* at 403. This criticism is misplaced, however, because the *Ligon* court's interpretation ignores the statute's illuminating legislative history.

Clearly, the Bank and Mr. Johnson did not bargain for a nonrecourse mortgage loan. Allowing Mr. Johnson to reschedule its debt to the Bank under chapter 13, after failing to reaffirm the discharged debt in his Chapter 7 action, would allow Mr. Johnson to impose on the Bank a unilateral reaffirmation of the mortgage. Because the Bank could have refused to agree to a reaffirmation of the mortgage in Johnson's Chapter 7 proceeding, *see* 11 U.S.C. § 524(c), it cannot effectively be forced to agree to a reaffirmation now by confirming scheduling in Johnson's Chapter 13 plan. *See In re Russo*, 94 Bankr. 127, 129 (Bankr. N.D. Ill. 1988); *In re McKinstry*, 56 Bankr. at 193.

Similarly, the Bank does not have a "claim" against Johnson as defined in 11 U.S.C. § 101(4). That statute defines claim as a:

> (A) *right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance *if such breach gives rise to a right to payment*, whether or not such right to an equitable remedy is reduced to judgment, fixed contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

(Emphasis added.) Clearly, the Bank has no "right to payment" from Johnson under § 101(4)(A), because Johnson's personal liability on the mortgage was discharged under Chapter 7. Moreover, the Bank has no right to an equitable remedy for breach of performance which gives rise to a right to payment under § 101(4)(B). Although the Bank has a right to an equitable remedy in the form of a state court foreclosure proceeding because Johnson breached performance on his promissory note, that breach does not give rise to a "right to payment." The Bank no longer has a right to receive payment from Johnson due to his breach because Johnson obtained a discharge from personal liability under Chapter 7. Thus, the Bank has no *right to payment from Johson*, either directly or indirectly through a mortgage foreclosure action in state court. Accordingly, the Bank has no "claim" as defined in either paragraph (A) or paragraph (B) of § 101(4).

Because we hold that a debtor's Chapter 13 plan cannot be confirmed where it improperly schedules a debt previously discharged under Chapter 7, we do not reach the good-faith and feasibility issues raised by the Bank.[2] We affirm the district court's ruling reversing Johnson's Chapter 13 plan and remand to the bankruptcy court for further proceedings as necessary.

AFFIRMED.

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[2] We note, however, that the Bank presents compelling arguments with respect to each of these issues.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	Civil No.
CURTIS REED JOHNSON,	)	88-1270-K
	)	FILED
Debtor.	)	JAN 3 '89
	)	

MEMORANDUM AND ORDER

Home State Bank of Lewis, Kansas (the "Bank"), creditor, appeals from the bankruptcy court's confirmation of the Chapter 13 Plan of Curtis Reed Johnson, debtor. The Bank seeks reversal of the order confirming the plan on the ground the plan lacks feasibility, was not proposed in good faith, and improperly schedules a debt previously discharged in the debtor's Chapter 7 bankruptcy proceeding.

The court previously heard oral argument on this appeal, but reserved ruling at that time. After reviewing the briefs and supporting documentation filed by the parties, as well as an amicus curiae brief filed by the Kansas Bankers Association, the court is now prepared to rule.

In reviewing the bankruptcy court's decision, this court is bound by the factual findings of the bankruptcy court unless they are clearly erroneous. The legal conclusions of the bankruptcy court, however, are subject to *de novo* review by this court. *In re Herd*, 840 F.2d 757, 759 (10th Cir. 1988); *In re Branding Iron Motel, Inc.*, 798 F.2d 396, 399 (10th Cir. 1986).

The facts relevant to this appeal are as follows:

On May 1, 1978, Curtis Johnson and his wife, Donna Jo Johnson, ("the Johnsons") executed a promissory note in favor of Travelers Insurance Company ("Travelers") in the amount of $165,000.00. The note was secured by a first mortgage on two quarter sections of land in Edwards County, Kansas.

On June 2, 1978, the Johnsons executed a promissory note in the amount of $100,000.00 to the Home State Bank. To secure the loan, the Johnsons gave the Bank a second mortgage on the Edwards County property. The mortgage states that it is subject to the first mortgage of Travelers. Both the first and second mortgages contained clauses whereby in the event of a default, any royalty income received by the Johnsons from certain oil and gas leases on the property would be assigned to the mortgagees.

On February 25, 1983, the Johnsons executed another loan agreement with the Bank through which the Johnsons received a line of credit in the aggregate amount of $370,000.00. The Johnsons executed two notes with respect to this loan agreement, a renewal note in the amount of $310,000.00 and a new note in the amount of $60,000.00. The loans were secured by security agreements on various personal property and by the 1978 real estate mortgage in the amount of $100,000.00.

The Johnsons subsequently defaulted on their notes with the Bank, and on March 23, 1984, the Bank filed a foreclosure action against the Johnsons in the District Court of Edwards County, Kansas. The Bank sought judgment against the Johnsons for the balance due on the

renewal note, plus interest, and for foreclosure of its mortgage and sale of the real estate and the royalty interests and the personal property covered by the security agreements.

The Johnsons filed their joint Chapter 7 petition in bankruptcy on October 9, 1984. On April 11, 1985, the bankruptcy court discharged the Johnsons from all dischargeable debts. At approximately the same time, the bankruptcy court entered an order granting the Bank relief from the automatic stay to proceed with the foreclosure action it had previously filed in the District Court of Edwards County.

On October 9, 1985, the District Court of Edwards County granted summary judgment in favor of the Bank. The court found the Bank was entitled to foreclose its June 2, 1978 mortgage and have the property sold, subject only to Travelers' first mortgage, to all oil and gas leases of record, and to the Johnsons' right to redeem the property.

Pursuant to the order of sale, the property was subsequently sold for the sum of $473,013.41. That sum represented the combined bids of Travelers ($134,083.00) and the Bank ($337,172.45), and the additional sum of $1,757.96 for taxes.

On December 4, 1985, the Johnsons filed their notice of appeal from the judgment of the Edwards County District Court. The appeal was subsequently transferred to the Kansas Supreme Court. Sometime prior to resolution of the case by the Kansas Supreme Court, the Bank purchased the first mortgage of Travelers and thus became the holder of both mortgages.

On December 11, 1986, the Kansas Supreme Court reversed and remanded the case to the district court with directions to set aside the sheriff's sale and deed, and for further proceedings in conformity with the opinion. *Home State Bank v. Johnson*, 240 Kan. 417, 729 P.2d 1225 (1986). The court held, *inter alia*, that when a district court enters an order of foreclosure *in rem* against mortgaged land, it is error for the court to fail to determine and state the amount of the judgment which is being entered against the land.

On remand, the district court granted the Bank judgment on its second mortgage *in rem* in the principal amount of $100,000.00, plus accumulated interest. The court also found that the balance due on the first mortgage previously owned by Travelers and purchased by the Bank amounted to $100,447.22. Further, the court granted the Bank an *in rem* judgment in the amount of $1,757.96 for taxes paid by the Bank. Finally, the court entered an order of sale specifying that the property be sold by the sheriff on April 3, 1987.

On March 2, 1987, Curtis Johnson filed his voluntary Chapter 13 petition in bankruptcy. The debtor listed the Bank as a partially secured creditor based on the district court's most recent entry of judgment. On May 7, 1987, the Bank filed a "secured" proof of claim in this matter in the amount of $511,421.55, and on June 3, 1987, the Bank filed a detailed objection to the confirmation of the debtor's proposed plan.

On June 23, 1987, the bankruptcy court held debtor's plan "not confirmable for lack of feasibility on present circumstances," but gave the debtor an opportunity to

present an amended plan. (Tr., p. 108.) The debtor subsequently filed his first amended plan and the Bank again filed objection to the debtor's proposed plan.

Under the amended plan, the debtor proposes to pay to the Bank the Edwards County District Court judgment in five annual installments of $11,100.00, $35,520.00, 35,520.00, $38,850.00, and $19,425.00, with a final balloon payment of $80,625.92 at the conclusion of the 5-year plan. The plan further proposes to make monthly payments through the trustee in the amount of $291.42 to Mid-Kansas Federal Savings and Loan Association, with a balloon payment of $6,507.00 to that institution at the end of the 60-month plan.

The bankruptcy court confirmed debtor's first amended Chapter 13 plan on April 8, 1988. While the debtor has made the first payment due to the trustee in the amount of $11,100.00, as of December 9, 1988, he had not yet made his 1988 annual payment of $35,520.00.

The Bank now appeals from the bankruptcy court's order confirming the debtor's Chapter 13 plan. The Bank contends the court erred in confirming the plan because the plan included debts previously discharged in debtor's Chapter 7 proceedings. The Bank further argues the bankruptcy court erred in finding the debtor's plan was feasible and proposed in good faith.

The Bank first contends reversal of the bankruptcy court's order confirming the debtor's Chapter 13 plan is required because the court improperly permitted the debtor to schedule a debt which had been previously discharged in Chapter 7 proceedings. The Bank points out that while Chapter 13 permits a qualified debtor to

reschedule his obligations, the plan can only deal with the debtor's "creditors". A "creditor" is an "entity that has a claim against the debtor." 11 U.S.C. § 101(9). A "claim" is a "right to payment, . . . " or a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, . . . " 11 U.S.C. § 101(4). The Bank reasons that when the debtor's obligation to the Bank was discharged under Chapter 7, the debtor no longer had any personal liability to the Bank, and therefore the Bank had no right to payment from the debtor and no "claim" against the debtor which could be scheduled in a Chapter 13 plan.

The debtor acknowledges that the Bank holds a lien against his property but no longer holds any claim against him personally. Nevertheless, the debtor contends the Bank has a "claim" against him which can be restructured in a Chapter 13 proceeding. The debtor reaches this conclusion by broadly defining the term "claim" to include claims against the debtor's property.

The bankruptcy court agreed with the debtor herein and found that even though a debtor's personal liability on a mortgage has been discharged, the debtor may propose a confirmable plan under Chapter 13 to satisfy the liability. The court held:

> A creditor's "claim" under Chapter 13 includes not only a right to payment but also a right to an equitable remedy for breach of performance.
>
> When a debtor receives a discharge of a secured debt it changes the debt relationship between the parties to a nonrecourse obligation. The reamortization of a nonrecourse obligation, therefore, may be accomplished in a Chapter 13 plan.

(Memorandum of Decision, Apr. 8, 1988, pp. 10-11) (citations omitted.) Because the bankruptcy court's conclusion is a legal one, it is subject to *de novo* review by this court.

The Tenth Circuit Court of Appeals has recognized that although a debtor has been discharged from personal liability on a secured debt under Chapter 7, the *in rem* liability of the property held as security remains unaffected and unenforceable by the mortgagee after discharge. *See Chandler Bank of Lyons v. Ray*, 804 F.2d 577, 579 (10th Cir. 1986). *See also* 3 COLLIER ON BANKRUPTCY ¶524.01[3] (L. King. 15th ed. 1988). The court is unaware, however, of any controlling authority on the issue of whether a debtor who has been discharged from *in personam* liability on a secured debt may then reschedule that debt in a Chapter 13 proceeding.

The majority of courts which have considered the issue now before this court have found that a debtor may not schedule a debt in a Chapter 13 plan if that debt has been previously discharged in a Chapter 7 proceeding. *See, e.g., In re McKinstry*, 56 Bankr. 191, 193 (Bankr. D. Vt. 1986) (debtor may not unilaterally reaffirm a discharged debt in an attempt to avoid foreclosure by scheduling the creditor in a proposed Chapter 13 plan); *In re Binford*, 53 Bankr. 307, 309 (Bankr. W.D. Ky. 1985) (debtor could not include with Chapter 13 plan a proposal to cure arrearage due a secured real estate mortgagee where mortgagee was listed and discharged in previously filed Chapter 7 proceeding and no reaffirmation or redemption agreement was executed, since mortgage created no legal obligations upon debtor, and underlying debt had been discharged); *In re Brown*, 52 Bankr. 6, 7 (Bankr. S.D. Ohio W.D. 1985) (Chapter 13 case, filed after discharge of

Chapter 7 case, could not be utilized to compel mortgagee to accept cure of arrearage owed on defaulted mortgaged).

The primary rationale underlying these decisions was recently summarized in *In re Hagberg, to be reported at* 92 Bankr. 809 (Bankr. W.D.Wis. 1988), as follows:

> First, because a chapter 13 plan can only deal with "creditors," a plan proposing to cure a default on a discharged mortgage obligation is statutorily defective since the mortgagee holding the discharged debt is no longer a "creditor" of the mortgagor. Second, this treatment of the mortgagee constitutes the imposition of a unilateral reaffirmation of the discharged debt, contrary to the consensual character of reaffirmation under the Bankruptcy Code.

More recently, a number of courts have taken a different approach, holding that a debtor may, through a Chapter 13 plan, cure a default on a mortgage debt previously discharged under Chapter 7. *See, e.g., Matter of Metz,* 820 F.2d 1495, 1498 (9th Cir. 1987) (Chapter 13 petitioner may include a mortgage claim within a plan even though the underlying obligation of the mortgage was discharged in debtor's prior chapter 7 case); *In Re Hagberg,* 82 Bankr. 809 (even though creditor's only rights are against property of the debtor, creditor has a "claim" against the debtor which may be scheduled in Chapter 13 plan); *In re Klapp,* 80 Bankr. 540, 542 (Bankr. W.D. Okla. 1987) (a mortgage securing a debt previously discharged in Chapter 7 proceedings constitutes a nonrecourse obligation, and thus can be scheduled in a Chapter 13 plan); *In re Lewis,* 63 Bankr. 90, 92 (Bankr. E.D. Pa. 1986) (although debtor's personal obligation to mortgagee has been discharged in prior Chapter 7 proceeding, debtor's obligation to mortgagee was still a "claim" which could be scheduled in debtor's Chapter 13 plan).

The basis for these decisions was succinctly explained by the court in *In re Hagberg,* 82 Bankr. at ___, as follows:

> Reasoning that the surviving in rem obligation held by the mortgagee is the equivalent of a nonrecourse obligation, the courts adopting this position conclude that since the Code specifically treats nonrecourse obligations as a claim against the debtor, the only inhibition imposed by the Code is the good faith requirement of [11 U.S.C.] section 1325(a)(3).

While the court recognizes that this approach, i.e., permitting the debtor to schedule in a Chapter 13 plan a debt which has been previously discharged under Chapter 7, constitutes the "emerging view," *In re Hagberg,* 92 Bankr. at ___, the court is not persuaded that it is the correct approach.

Rather, the court finds that a debt which has been discharged in a Chapter 7 proceeding in which no reaffirmation or redemption agreement was executed, cannot be scheduled in the debtor's subsequent Chapter 13 plan. The court is convinced that where, as here, a mortgage obligation has been discharged under Chapter 7, the mortgagee no longer holds a "claim" against the debtor, but rather, holds only a lien against the debtor's real estate. Thus, the mortgagee is not a "creditor" of the debtor and holds no claim which can be scheduled in debtor's Chapter 13 plan.

11 U.S.C. § 101(4) defines "claim" as a:

> (A) *right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance *if such breach gives rise to a right to payment*, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

(Emphasis added.)

It is clear to the court that the Bank has no "right to payment" from the debtor herein since the debtor's personal liability on the underlying obligation was discharged under Chapter 7. Thus, the bank has no "claim" against the debtor as that term is defined at § 101(4)(A). Moreover, the court does not concur with the bankruptcy court's determination that the Bank has a right to an equitable remedy for breach of performance which gives rise to a right of payment. While the bank may have the right to an equitable remedy in the form of a state court foreclosure action because the debtor has breached performance on a promissory note, it cannot be said that the debtor's "breach" gives rise to a right of payment. The Bank will never have a right to receive payment from the debtor's "breach" because the debtor obtained a discharge under Chapter 7. Simply said, the Bank has no right to payment from the debtor – either directly or through a mortgage foreclosure action in state court.

Nor does the court find that the Bank's interest in the debtor's property can properly be characterized as a

"nonrecourse loan agreement." The Bank holds a lien against the debtor's real estate which is not accompanied by any obligation, note, debt, or right to payment upon the debtor's breach of performance.

Finally, the court finds it significant that the debtor had an opportunity to negotiate a reaffirmation of the discharged debt during the Chapter 7 proceeding, but failed to do so. 11 U.S.C. § 524(c); *In re McKinstry*, 56 Bankr. at 193. Therefore, the court will not now permit the debtor to impose a unilateral reaffirmation of the mortgage upon the mortgagee by scheduling the discharged debt in a Chapter 13 plan. *Id. See also In re Binford*, 53 Bankr. at 309; *In re Brown*, 52 Bankr. at 7.

Because the court concludes today that the debtor's Chapter 13 plan cannot be confirmed because it improperly schedules a debt previously discharged under Chapter 7, the other issues raised by the Bank – i.e., that the debtor's Chapter 13 plan was not proposed in good faith and lacks feasibility – are moot and will not be taken up by the court.

IT IS ACCORDINGLY ORDERED this 3 day of January, 1989, that the bankruptcy court's order affirming debtor's Chapter 13 plan is reversed.

/s/ Patrick F. Kelly
PATRICK F. KELLY, JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	) Case No. 87-10585
CURTIS REED JOHNSON,	) Chapter 13
	)
Debtor.	) Filed
	) APR 08 1988

MEMORANDUM OF DECISION

This matter comes before the Court upon Home State Bank of Lewis, Kansas' objection to confirmation based upon feasibility of debtor's Chapter 13 plan. Curtis Reed Johnson ("debtor") appears by W. Thomas Gilman of Redmond, Redmond & Nazar, Wichita. Home State Bank of Lewis, Kansas ("the Bank") appears by Dennis E. Shay of Smith, Shay, Farmer & Wetta, Wichita. The standing trustee, Royce E. Wallace, appears personally.

FACTS

The Court finds the following to be the relevant facts.

1. On May 1, 1987 the debtor and Donna Jo Johnson ("the Johnsons") executed a promissory note in favor of the Travelers Insurance Company ("Travelers") in the amount of $165,000.00 payable with interest at the rate of nine and one-half percent (9.5%) per annum with semiannual payments due on January 1 and July 1 of each year and the principal balance being due on January 1, 1993. The promissory note was secured by a first mortgage on the following property owned by the debtor, to-wit:

> The Northeast Quarter (NE/4) of Section Twelve (12), Township Twenty-five South (T25S), Range Seventeen West (R17W) and the Northwest

> Quarter (NW/4) of Section Seventeen (17), Township Twenty-five South (T25S), Range Sixteen West (R16W), all in Edwards County, Kansas.

2. On June 2, 1978 the debtor executed a promissory note and mortgage in the principal amount of $100,000.00 in favor of the Bank, granting the Bank a security interest in the above described real property. Both the first and second mortgages contained clauses whereby in the event of default the Johnsons' royalty income would be assigned to the respective mortgagees.

3. On February 25, 1983 the Johnsons executed a written loan agreement in favor of the Bank, a promissory note in the principal amount of $310,000.00 with interest at fourteen and one-half percent (14.5%) per annum with a maturity date of December 1, 1983, and a promissory note in the principal amount of $60,000.00 with an interest rate of fourteen and one-half percent (14.5%). The loans were secured by the above mentioned mortgage to the Bank dated June 2, 1978, in the amount of $100,000.00, as well as certain machinery and equipment for which the Johnsons executed security agreements.

4. The Johnsons became delinquent on their payments to the Bank.

5. On March 23, 1984 the Bank filed a foreclosure action against the Johnsons in Edwards County, Kansas district court to foreclose its mortgage.

6. On October 9, 1984, the Johnsons filed a voluntary Chapter 7 petition (Case No. 84-11667).

7. This Court entered an order lifting the automatic stay for purposes of foreclosure and allowed the Bank to

proceed in rem against the Johnsons with a foreclosure proceeding that it had previously filed in Edwards County, Kansas district court.

8. On April 11, 1985 the Johnsons obtained their discharge in bankruptcy.

9. On October 9, 1985 the Edwards County, Kansas district court granted the Bank's motion for summary judgment and ordered the above mentioned property to be sold on December 6, 1985 at 10:00 a.m. The Edwards County sheriff sold the Johnsons' real property, accepting a bid from the Bank in the total amount of $473,013.41. The bid consisted of $134,083.00 by Travelers and an additional bid of $338,930.41 by the Bank. This sale was confirmed by the Edwards County district court.

10. On December 4, 1985 the Johnsons filed their notice of appeal from the judgment of the Edwards County, Kansas district court. On June 6, 1986 upon the motion of the Johnsons, the appeal was transferred to the Kansas Supreme Court.

11. The Bank purchased the first mortgage of Travelers, prior to the decision of the Kansas Supreme Court. As such the Bank was the holder of both mortgages when the Supreme Court made its decision.

12. On December 11, 1986, the Kansas Supreme Court issued its opinion reversing and remanding the decision of the Edwards County, Kansas district court with instructions to set aside the sheriff's sale and for further proceedings in conformity with the Court's opinion. (*See Home State Bank v. Johnson*, 240 Kan. 417 (1986)).

13. On February 9, 1987 the case came before the Edwards County, Kansas district court on remand from the Kansas Supreme Court. On February 10, 1987 a journal entry of judgment on remand was filed, which was modified by a nunc pro tunc journal entry filed February 17, 1987. The journal entry granted the Bank a judgment on its second mortgage in rem against the property subject to the mortgage in the principal amount of $100,000.00 plus accumulated interest from December 2, 1983 through January 7, 1987 at the simple rate of fourteen and one-half percent (14.5%) per annum in the amount of $44,930.13 with a per diem rate after January 7, 1987 in the amount of $39.72. The court also found that the balance due on the first mortgage previously owned by Travelers and purchased by the Bank amounted to $100,447.22 with per diem interest at the rate of $25.46 after January 7, 1987. The court also granted the bank an in rem judgment in the amount of $1,757.96 for taxes paid by the Bank attributable to the above mentioned real property.

14. Thereafter the court entered an order of sale specifying that the above mentioned real property be sold by the Edwards County sheriff. The sale was scheduled for April 3, 1987 at 10:00 a.m.

15. On February 24, 1987 Donna Jo Johnson executed a quitclaim deed to her husband, the debtor herein, transferring all of her ownership interest in the aforedescribed real property to him. The quitclaim deed was filed with the Edwards County Register of Deeds on February 26, 1987. On February 24, 1987 Douglas T. Johnson and Diane J. Johnson (son-in-law and daughter-in-

law of the Johnsons), executed a quitclaim deed transferring all ownership interests they had as of that date in the following described real property to the debtor herein:

> The Northeast Quarter (NE/4) of Section Twelve (12), Township Twenty-five South (T25S), Range Seventeen West (R17W), Edwards County, Kansas.

This quitclaim deed was filed with the Edwards County Register of Deeds on February 26, 1987.

16. On March 2, 1987 debtor filed his voluntary Chapter 13 petition. The debtor scheduled the Bank as a partially secured creditor based on the journal entry of judgment filed February 10, 1987 and the nunc pro tunc journal entry filed February 18, 1987.

17. After the foreclosure sale, during the pendency of the appeal to the Kansas Supreme Court, the debtor's exemption rights expired. Upon reversal by the Supreme Court, the Edwards County, Kansas district court ordered that the net proceeds from the Bank's farming operation on the realty be paid over to debtor.

18. On May 7, 1987 the Bank filed a "secured" proof of claim in this matter in the amount of $511,421.55. On May 14, 1987 the debtor objected to the same.

19. On June 3, 1987 the Bank filed a detailed objection to the confirmation of the debtor's proposed plan, specifying ten separate objections.

20. Under the plan the debtor proposes to pay the Bank the Edwards County district court judgment in the amount of $202,205.18 on the first and second mortgage held by the Bank with interest payments at nine and one-

half percent (9.5%) per annum in four annual installments of $35,520.00, $35,520.00, $38,850.00, and $19,425.00, with a final balloon payment of $80,625.92.

21. The plan proposes to make monthly payments through the trustee in the amount of $291.42 to Mid-Kansas Federal Savings and Loan Association, with a balloon payment to that institution at the end of the sixty-month plan.

22. During the five-year term the debtor's amended plan provides for payment of ten percent (10%) of all unsecured claims.

23. The debtor will be able to make the payments provided under the plan.

DISCUSSION

The Court is called upon to consider a legal maneuver sometimes referred to as a "Chapter 20." The debtor previously filed a Chapter 7 and now seeks to retain his farm, and reamortize the secured liability which survived, through a Chapter 13 plan. At issue is whether a Chapter 13 debtor may include within the plan amortized payments on a debt which was listed and discharged in a previous Chapter 7 proceeding. Parenthetically it should be noted that the debtor would not have been eligible for Chapter 13 until the discharge of his unsecured debt. For the reasons herein set forth, the debtor's plan is confirmed, and the Bank's objections are overruled.

JURISDICTION

Initially the Bank attacks the Court's jurisdiction in this matter, stating that debtor is not eligible for Chapter 13 relief due to debtor's recent discharge under Chapter 7. This is a misinterpretation of the Code. Section 727 bars a debtor from filing a second petition under Chapter 7 within the six-year period. 11 U.S.C. § 727(a)(8). The six-year bar to discharges found in § 727(a)(8) does not apply to cases commenced under Chapter 13; § 727(a)(8) applies only to cases under Chapter 7. *In re Baker*, 736 F.2d 481 (8th Cir. 1984); *In re Galt*, 70 B.R. 57 (Bankr. S.D. Ohio 1987); *In re Hubbard*, Case No. 86-10511, Slip Op. (Bankr. D. Kan. Dec. 19, 1986); *In re Ponteri*, 31 B.R. 859 (Bankr. D. N.J. 1983); *In re Meltzer*, 11 B.R. 624 (Bankr. E.D. N.Y. 1981).

CLAIM

The right of a Chapter 13 debtor to modify the rights of certain holders of secured claims is not disputed. 11 U.S.C. § 1322(b)(2). *See DiPierro v. Taddeo (In re Taddeo)*, 685 F.2d 24 (2d Cir. 1982). That right has been recognized following a state court final judgment of foreclosure. *Valente v. Savings Bank of Rockville*, 34 B.R. 362 (D.C. Conn. 1983).

The courts are divided in the issue of whether an in rem right, as exists in this case, constitutes a "claim" as defined by the Bankruptcy Code. § 102(2). The Bank's argument is that as a matter of law a Chapter 13 debtor cannot modify its rights following discharge in a previous Chapter 7 case because there is no cognizable "claim" to modify. The caselaw supporting this appears to be the

minority view.[1] *In re Reyes*, 59 B.R. 301 (Bankr. S.D. Cal. 1986) (Chapter 13 cannot confirm reaffirmation of a debt that was discharged under Chapter 7), *overruled by Matter of Metz*, 820 F.2d 1495 (9th Cir. 1987); *In re McKinstry*, 56 B.R. 191 (Bankr. D. Vt. 1986) (debtor may not unilaterally reaffirm a discharged debt by scheduling a creditor in a proposed Chapter 13 plan); *In re Brown*, 52 B.R. 6 (Bankr. S.D. Ohio 1985) (Chapter 13 debtor could not include in plan proposal to cure arrearage due mortgagee where mortgaged debt discharged in prior Chapter 7 case and no reaffirmation agreement executed as mortgage created no obligation on debtor and underlying debt discharged); *In re Fryer*, 47 B.R. 180 (Bankr. S.D. Ohio 1985); *Associates Financial Service Corp. v. Cowen*, 29 B.R. 888 (Bankr. S.D. Ohio 1983).

The better and apparently majority view is that a Chapter 13 debtor may include a mortgage claim within a plan, although the underlying obligation of the claim was discharged in debtor's prior Chapter 7 case. *Matter of Metz*, 820 F.2d 1495 (9th Cir. 1987); *In re Gayton*, 61 B.R. 612 (9th Cir. B.A.P. 1986) (prior discharge under Chapter 7 did not preclude Chapter 13 relief); *Matter of Lagasse*, 66 B.R. 41 (Bankr. D. Conn. 1986) (Chapter 13 debtors not barred from including in a plan treatment of a mortgage

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[1] While both parties have referred to this as the majority, it appears, however, to be the minority view. One circuit has held that a debtor does have a claim even though the underlying mortgage was discharged in a prior Chapter 7. *See, e.g., Matter of Metz*, 820 F.2d 1495 (9th Cir. 1987); *In re Gayton*, 61 B.R. 612 (9th Cir. B.A.P. 1986). Although it appears that this position was formerly a minority, the Court believes the Ninth Circuit opinions now constitute the majority view.

claim where underlying obligation of the mortgage had been discharged in debtor's prior bankruptcy case); *In re Lewis*, 63 B.R. 90 (Bankr. E.D. Pa. 1986) (an encumbrance against property constitutes a claim under the Code even though there is no in personam liability against the debtor).

The Court believes, absent controlling authority from the Circuit, that the *Metz* opinion is better reasoned. Even though a debtor's personal liability on a home mortgage has been discharged, the debtor may propose a confirmable plan under Chapter 13 to satisfy the liability. A creditor's "claim" under Chapter 13 includes not only a right to payment, but also a right to an equitable remedy for breach of performance. *Lewis, supra* at 91.[2]

When a debtor receives a discharge of a secured debt it changes the debt relationship between the parties to a nonrecourse obligation. § 506(d); *Matter of Lagasse, supra* at 43. The reamortization of a nonrecourse obligation, therefore, may be accomplished in a Chapter 13 plan.

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[2] The Bank criticized debtor's reliance upon *Lewis* and stated that *Lewis* is distinguishable because, unlike the present situation, the Chapter 13 debtor in that case was not in default under the mortgage. The Court, under the present facts, finds this difference not critical to the Court's conclusion. During the pendency of the debtor's appeal to the Kansas Supreme Court, the debtor's redemption rights expired, thereby further hindering the debtor's ability to remove the mortgage agreement from default. The current state of the mortgage arrearage should not dictate the policy under Chapter 13. Under the present facts this situation should not render the Bank's "claim" ineligible under Chapter 13.

GOOD FAITH

The Bank's next objection to the debtor's plan is that it is not filed in good faith. The Bank contends that due to the serial filings of debtor's two petitions, the debtor's plan has been proposed in bad faith in violation of § 1325(a)(3). The Bank's position is that serial bankruptcy filings demonstrate a lack of good faith. The Bankruptcy Code provides that the bankruptcy court shall confirm a plan if "the plan has been proposed in good faith and not by any means forbidden by law." § 1325(a)(3). "The good faith requirement is neither defined in the Bankruptcy Code nor discussed in the legislative history. The phrase should, therefore, be interpreted in light of the structure and general purpose of chapter 13." *Memphis Bank & Trust Co. v. Whitman*, 692 F.2d 427, 431-432 (6th Cir. 1982).

In this Circuit the determination of the debtor's good faith must be made from a review of a variety of factors. *Flygare v. Boulden*, 709 F.2d 1344 (10th Cir. 1983). In *Flygare* the Circuit set out a nonexhaustive list of eleven factors to be considered by the court. The factors need not be given the same weight. The court clearly disapproved any per se rule which would result in summary denial of confirmation of a Chapter 13 plan based on lack of good faith.

Therefore, when considering the good faith of the debtor, this Court has wide latitude in determining whether a plan was filed in good faith. *In re Lewis, supra* at 93. Serial bankruptcy filings are not per se in bad faith. *In re Baker*, 736 F.2d 481 (8th Cir. 1984); *In re Metz*, 67 B.R. 462 (9th Cir. B.A.P. 1986), *aff'd.*, 820 F.2d 1495 (9th Cir. 1987); *In re Lewis*, 63 B.R. 90 (Bankr. E.D. Pa. 1986); *In re*

Beauty, 42 B.R. 655 (D.C. E.D. La. 1984), *appeal dismissed*, 745 F.2d 53 (5th Cir. 1984). *But see In re Brown*, 52 B.R. 6 (Bankr. S.D. Ohio 1985); *In re Heywood*, 39 B.R. 910 (Bankr. W.D. N.Y. 1984); *In re Sardella*, 8 B.R. 401 (Bankr. S.D. Ohio 1981). The Bank relies on the assumption that debtor's second bankruptcy case was filed in an effort to salvage debtor's farm, and as such, evidences bad faith. The Bank's reliance on this assumption is misplaced. While abuse of legal process may constitute bad faith, use of it alone does not.[3]

The record contains no indication that the debtor proposed his plan in bad faith. The debtor proposes to pay the full value, including interest, of all property in which the Bank is secured. The Bank, under the plan, is to receive all its proceeds from the oil and gas production. Under the facts presented here the Court finds no basis for concluding that the plan was proposed in bad faith.

FEASIBILITY

While the parties generally refer to feasibility as an element of confirmation, the Court need only conclude that the debtor will be able to make payments under the plan. § 1325(a)(6). Payments are determined by three factors: (1) the amount of the debt or the value of the

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[3] This must be distinguished from serial filings made for the sole purpose of delaying a foreclosure sale. Had the debtor filed an earlier reorganization, which had been dismissed for failure to comply with court orders or file a plan, the Court might view the serial filing differently. At some point serial filing becomes abuse of process, not use of it.

property; (2) the appropriate discount factor; and (3) the term of repayment.

The debtor's plan proposes to pay the trustee $291.42 per month with a balloon payment of $7,222.77 to retire the debt held by Mid-Kansas Federal. The plan proposes to pay five annual payments to the Bank to satisfy interest on the debt and to liquidate the balance with a balloon in the amount of $80,625.92 at the end of the term. That payment will have to be obtained from a commercial lender. The balloon payment reflects approximately fifty-six percent (56%) of the appraised value of the debtor's real estate. Such a loan does not seem unlikely and therefore will not hinder confirmation. From the evidence, it appears that the debtor will be able to make the payments under the plan. The debtor testified that he will be able to make the payments. While the Bank was able to cast some doubt on his projections of income and expenses, there is no evidence to contradict the debtor's testimony. Thus, the Court concludes that the plan is "feasible."

VALUATION

The value of the claim filed by the Bank is limited to the in rem judgment of the Kansas Supreme Court. Turning to the valuation proposed by the debtor, the Court will accept the values determined by the debtor's witness. The projections proposed by the debtor's witness on the oil and gas runs, although not unreasonable, are slightly exaggerated. The same can be said for the projections on crop yields.[4] The witness' cash flow projections,

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[4] The plan represents that fifteen percent (15%) of debtor's farm income is to come from government payments. The Court

(Continued on following page)

although exaggerated, are also reasonable. The problem here is that the Bank has offered no expert testimony of its own to contradict these projections. Therefore, the debtor's values will be accepted.

The debtor's figures suggest a plan which is confirmable. Thus, the Court accordingly holds that the debtor's plan, as amended, shall be confirmed.

The foregoing constitutes findings of fact and conclusions of law as required by Fed. R. Civ. P. 52(a) and Fed. R. Bankr. P. 7052. A separate judgment will be entered giving effect to the determinations reached herein.

Signed this 8th day of April, 1988.

/s/ John K. Pearson
JOHN K. PEARSON
United States Bankruptcy
Judge

CERTIFICATE OF MAILING

The undersigned hereby certifies that the above and foregoing Memorandum of Decision has been furnished

(Continued from previous page)

recognizes that it is not known whether government payments will continue beyond 1988. The estimation and continuation of government payments is, at best, speculative. However, the Court cannot conclude that even the total discontinuation of government payments would critically hinder debtor's ability to make payments under the plan.

by United States mail, postage prepaid, this 8th day of April, 1988, to:

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/s/ Sue M. Jaqua
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CPLS, CLA

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: CURTIS REED JOHNSON, Debtor.	
HOME STATE BANK OF LEWIS, LEWIS, KANSAS, Appellee/Cross-Appellant, v. CURTIS REED JOHNSON, Appellant/Cross-Appellee,	Nos. 89-3029 89-3031 (D.C. No. 88-1270-K)
ROYCE WALLACE, Trustee and KANSAS BANKERS ASSOCIATION, Amici Curiae.	

JUDGMENT
Entered June 7, 1990

Before BRORBY, Circuit Judge, BARRETT, Senior Circuit Judge and WEST,* District Judge.

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

*The Honorable Lee R. West, United States District Judge for the Western District of Oklahoma, sitting by designation.

Upon consideration whereof, it is ordered that the judgment of that court is affirmed.

Entered for the Court
ROBERT L. HOECKER, Clerk
By Patrick Fisher
Patrick Fisher,
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

In re: CURTIS REED JOHNSON, Debtor.	)	
HOME STATE BANK OF LEWIS, LEWIS, KANSAS, Appellee/Cross-Appellant,	)	Nos. 89-3029 89-3031
v.	)	
CURTIS REED JOHNSON, Appellant/Cross-Appellee,	)	

ORDER

Filed August 1, 1990

Before HOLLOWAY, Chief Judge, BARRETT, Senior Circuit Judge, McKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY and EBEL, Circuit Judges and WEST, * District Judge.

This matter comes on for consideration of appellant/cross-appellee's petition for rehearing with suggestion for rehearing en banc, filed in the captioned case.

*Honorable Lee R. West, United States District Judge for the Western District of Oklahoma, sitting by designation.

Upon consideration of the petition for rehearing, the petition is denied by the panel to whom the case was argued and submitted.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

By /s/ Patrick Fisher
Patrick Fisher
Chief Deputy Clerk

(2)

No. 90-693

In The
Supreme Court of the United States
October Term, 1990

CURTIS REED JOHNSON,

Petitioner and Cross-Respondent,

vs.

HOME STATE BANK,

Respondent and Cross-Petitioner.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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A. QUESTION PRESENTED FOR REVIEW

Can a debtor, who previously received a discharge in a Chapter 7 bankruptcy, obtain confirmation of a Chapter 13 plan which reamortizes a lien that survived his Chapter 7 bankruptcy and makes no provisions to cure his default or pay arrearages.

B. TABLE OF CONTENTS

C. TABLE OF AUTHORITIES

CASES

STATUTES

D. ADDITIONAL STATUTES INVOLVED

11 U.S.C. §101(9) "creditor" means –

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h), 502(i) of this title; or

(C) entity that has a community claim

E. STATEMENT OF THE CASE

[1]The Respondent (hereinafter "Bank") adopts the Statement of Facts filed by Petitioner (hereinafter "Johnson" or "Debtor"), with the exception of the following additions and modifications. On page 4 of his petition, Johnson correctly states that he and his wife (hereinafter "Johnsons") defaulted on their notes with the Bank, and on March 23, 1984, the Bank filed a foreclosure action against them in Edwards County, Kansas, District Court. Johnson does not mention that on September 7, 1984, approximately one month before the Johnsons filed their joint voluntary Chapter 7 petition, the Johnsons executed a deed to their son, transferring to him all of their ownership in a quarter section of land owned by the Johnsons in Edwards County, Kansas, and secured by the first and second mortgages. This deed was filed with the Edwards County Register of Deeds on September 10, 1984.

[1] Respondent draws from the facts recited by the Tenth Circuit and District Courts in their opinions. See, *In Re Johnson*, 96 B.R. at 326-28; *In Re Johnson*, 904 F.2d at 564.

Johnson's petition notes that on February 24, 1987, Johnson's wife, son, and daughter-in-law executed quitclaim deeds consolidating ownership of all real property in issue to Johnson. Those quitclaim deeds were filed for record with the Edwards County Register of Deeds on February 26, 1987. Four days later, on March 2, 1987, while foreclosure proceedings were pending and one month before the property was scheduled to be sold by the sheriff, Johnson filed his voluntary Chapter 13 petition in bankruptcy.

On or about June 23, 1987, the Bankruptcy Court held Debtor's plan was "not confirmable for lack of feasibility under present circumstances."

On or about July 6, 1987, Johnson filed his amended Chapter 13 plan. The Bank, again, filed an objection to the amended plan. Under the amended plan, Johnson proposed to pay the Bank the Edwards County District Court judgment in five annual installments of $11,100.00, $35,520.00, $35,520.00, $38,850.00, and $19,425.00, with a final balloon payment of $80,625.92 at the conclusion of the five-year plan. The plan further proposed to make monthly payments in the amount of $291.42 to Mid Kansas Federal Savings & Loan, the only other creditor in Johnson's plan, with a balloon payment of $6,507.00 to that institution at the end of the 60-month plan.

During its five (5) year term, Johnson's amended plan provides no payment to unsecured creditors and provides no cure to any arrearages. During the pendency of the bankruptcies and appeals, Johnson has remained in possession of the property and received farm income and government subsidies.

Johnson's amended plan calls for the borrowing of one hundred sixty-three (163) percent of his estimate of the appraised value of the subject property at the conclusion of the plan.

Johnson was only eligible to file his Chapter 13 bankruptcy because his unsecured debt had been discharged in his prior Chapter 7 bankruptcy.

Johnson neither attempted nor negotiated a reaffirmation of the discharged debt during his Chapter 7 bankruptcy.

Pursuant to his plan, Johnson has made only one payment to the Bank in the amount of $10,000.00 and is delinquent in his payments in the amount of $109,890.00 as of December 1, 1990.

F. SUMMARY OF THE ARGUMENT

There Is No Conflict Among Decisions of The United States Courts of Appeals

The Tenth Circuit Court of Appeals' opinion does not conflict with decisions of other Circuits, District Courts, or Bankruptcy Courts cited in Johnson's petition. All opinions cited by Johnson reviewed Chapter 13 plans that cured arrearages and proposed full payment on the original debt that had been discharged in the Debtor's previous Chapter 7 plan. The Tenth Circuit encountered an issue factually different from those courts cited by the Debtor in his Petition for Writ of Certiorari.

Other Grounds Exist To Support The Tenth Circuit Decision

Even if this Court were to review the issue raised by Johnson, the issues of Debtor's lack of good faith and feasibility of his plan provide other grounds to support the decision below. 11 U.S.C. §101(4) and its legislative history defining "right to payment" provide additional grounds for affirmation of the Tenth Circuit's decision.

The Tenth Circuit's Decision Is Not Contrary To A Decision Of This Court

The Debtor asserts *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. ___, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990) is controlling of the issues raised in his petition. The *Davenport* decision is factually incompatible with the issues that were before the Tenth Circuit. *Davenport* held the terms "debt" and "claim" permitted criminal restitution obligations to be discharged in a Chapter 13 bankruptcy. The present case involves a debtor who discharged his unsecured debt in a Chapter 7 bankruptcy and then filed a Chapter 13 bankruptcy rescheduling the discharged debt without providing any cure to the default or payment of arrearages. The *Davenport* decision is not controlling upon the issues here.

G. REASONS WHY THE WRIT SHOULD BE DENIED

There Is No Conflict Among Decisions of The United States Courts of Appeals

The Tenth Circuit Court of Appeals held that "a debtor's Chapter 13 plan cannot be confirmed where it

improperly schedules a debt previously discharged under Chapter 7. . . . " *In Re Johnson*, 904 F.2d 563, 566 (10th Cir. 1990). Johnson primarily argues his Petition for Writ of Certiorari should be granted because the Tenth Circuit holding conflicts with the decisions of two other Circuit Courts of Appeals[2] and several federal district courts and bankruptcy courts.[3]

Contrary to Johnson's assertions, there is no conflict among the Circuits. Similarly, the Tenth Circuit Court of Appeals' opinion is not in conflict with the decisions of the federal district courts and bankruptcy courts cited by Johnson.

Johnson argues that the Tenth Circuit's decision is exactly the opposite of two other Circuit Courts of Appeals because it "creates a rule of law that deprives people subject to the Tenth Judicial Circuit's jurisdiction of a type of relief in bankruptcy which is expressly available to other people subject to the jurisdiction of the Ninth and Eleventh Judicial Circuits."[4] This is a perceived misstatement, as the Tenth Circuit's decision does not conflict with either *In Re Metz*, 820 F.2d 1495 (9th Cir. 1987) or *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989).

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[2] See, *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989); *In Re Metz*, 820 F.2d 1495 (9th Cir. 1987)

[3] See, *Grundy Nat. Bank v. Johnson*, 106 B.R. 95 (W.D.Va. 1989); *In Re Ligon*, 97 B.R. 398 (Bankr. N.D.Ill. 1989); *In Re Smith*, 94 B.R. 216 (Bankr. M.D.Ga. 1988); *In Re Hagberg*, 92 B.R. 809 (Bankr. W.D.Wis. 1988); *In Re Klapp*, 80 B.R. 540 (Bankr. W.D.Okla. 1987); *In Re Lagasse*, 66 B.R. 41 (Bankr. D.Conn. 1986); *In Re Lewis*, 63 B.R. 90 (Bankr. E.D.Pa. 1986)

[4] See Johnson, Petition for Certiorari, P.7

Both the *Metz* and *Saylors* courts held that a Chapter 13 plan may cure arrearages on home mortgages even though the underlying mortgage debt had been discharged in a prior Chapter 7 proceeding. In both the *Metz* and *Saylors* cases, the debtors proposed Chapter 13 plans that cured all arrearages, with reinstatement and full payment of the original debt. The *Metz* and *Saylors* courts also found it significant that the debtor's monthly incomes had increased.

In the present case, Johnson's amended plan does not reinstate any debt previously discharged in his Chapter 7 plan. Johnson's plan does not provide for a cure of any arrearages. His Chapter 13 plan provides no payment to unsecured creditors. Unlike the debtors in *Metz* and *Saylors*, Johnson's monthly income had not increased. In fact, the Bank has received only one $10,000.00 payment from Johnson under his plan, while Johnson has remained in possession of the property and received farm income and government subsidies. As of December 1, 1990, Johnson is $109,890.00 delinquent in his payments under his Chapter 13 plan.

The Tenth Circuit simply did not have the same facts and issues that were before the *Metz* and *Saylors* courts. Thus, there is no conflict among the Circuits.

Not only is there no conflict among the Circuits, but there is no conflict among the federal district courts and bankruptcy courts Johnson cites in his petition.[5] In every court decision cited by Johnson in support of his Petition for Certiorari, the Court reviewed a Chapter 13 plan that

[5] See Johnson, Petition for Certiorari, P.6, n.2

cured arrearages on a previously discharged debt.[6] Since Johnson's plan provides no cure for arrearages, this issue was never before the Tenth Circuit Court of Appeals and is, therefore, not a proper question presented for review pursuant to Rule 10 of the Rules of the Supreme Court.

Because the Tenth Circuit encountered a matter factually different from those courts cited by the Debtor in his Petition for Writ of Certiorari, there is no conflict and, thus, individuals subject to the Tenth Judicial Circuit's jurisdiction are not denied relief in bankruptcy which is available to individuals in other circuits.

Other Grounds Exist To Support The Tenth Circuit Decision

It is also interesting to note that two cases cited by Johnson as conflicting with the Tenth Circuit Court of Appeals, *In Re Hagberg*, 92 B.R. 809 (Bankr. W.D.Wis. 1988) and *In Re Smith*, 94 B.R. 216 (Bankr. M.D.Ga. 1988), did not confirm Chapter 13 plans that were proposing cures of arrearages because of bad faith and equity reasons. Not one of the cases cited by Johnson dealt with the fact situation that was before the Tenth Circuit and which is being attempted to be brought before this Court. In fact, the *Metz* and *Saylors* courts not only addressed Chapter 13 plans curing arrearages but also stated that the good faith of the debtor would be considered before allowing the curing of arrearages on a debt previously discharged in a prior bankruptcy. While not reaching the good faith issue in the present case because of its ruling

[6] See n.3, supra

on another issue, the Tenth Circuit specifically indicated the Bank presented compelling arguments to both good faith and feasibility issues. *In Re Johnson*, 904 F.2d 563, 566 (10th Cir. 1990). Thus, even if this Court were to review the issue raised by Johnson, other grounds exist to support the decision of the Tenth Circuit. See, *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 419, 97 S.Ct. 2766, 53 L.Ed.2d 851, 862 (1977).

Central to the issue before the Tenth Circuit were the definitions of "creditor," "debt," and "claim". "Creditor" is defined at 11 U.S.C. §101(9) as an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor. . . . " "Debt", as defined at 11 U.S.C. §101(11), "means liability on a claim". "Claim" is defined at 11 U.S.C. §101(4) as follows:

> (A) *Right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) *Right to an equitable remedy for breach of performance if such breach gives rise to a right to payment*, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. (Emphasis added.)

Johnson argues that the Bank holds a "claim" because it holds a "right to an equitable remedy for breach of performance" and that "such breach gives rise to a right to payment" as defined in 11 U.S.C. §101(4)(B).

The legislative history to 11 U.S.C. §101(4)(B) is illuminating:

> On the other hand, rights to an equitable remedy for a breach of performance with respect to which such breach *does not* give rise to a right to payment are *not* "claims" and would therefore *not* be susceptible to discharge in bankruptcy. (Emphasis added.)

124 Cong. Rec. H. 11,090 (daily ed. Sept. 28, 1978); S. 17,406 (daily ed. Oct. 6, 1978). The legislative history also indicates that the "right to an equitable remedy for a breach of performance if such breach gives rise to a right to payment" is intended to address:

> . . . rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example, in some states, a judgment for specific performance may be satisfied by an alternative right to payment, in the event performance is refused; in that event, the creditor entitled to specific performance would have a "claim" for purposes of a proceeding under Title 11.

124 Cong. Rec. H. 11,090 (daily ed. Sept. 28, 1978); S. 17,406 (daily ed. Oct. 6, 1978). Therefore, instead of an equitable remedy being discharged, a particular creditor would have a "claim" under the Bankruptcy Code because of the creditor's alternative "right to payment". Johnson, the Bank, the District Court, and the Tenth Circuit found no authority in Kansas state law for an "alternative right to payment". Thus, the Bank, with no "right to payment," has no "claim" under 11 U.S.C. §101(4). Notwithstanding that Debtor's Chapter 13 plan is incompatible with Chapter 13 plans before other Courts, 11

U.S.C. §101(4) and its legislative history also support the affirmation of the Tenth Circuit's decision.

Finally, Johnson argues that the Tenth Circuit has expanded the language of the definition of 11 U.S.C. §101(4) to require that "right to payment" be "from the debtor". This is a perceived misstatement of the holding below. The Court below found that there was no "right to payment"; not from Johnson or anyone because of the nature of his proposed plan, Kansas state law, and the Bankruptcy Code.

The Tenth Circuit's Decision Is Not Contrary To A Decision Of This Court

Debtor asserts the Tenth Circuit decision departs from this Court's decision in *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. ___, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990), where this Court held the expansive language of the terms "debt" and "claim" permitted criminal restitution obligations to be discharged under Chapter 13 of the Bankruptcy Code. The present issue does not involve a criminal restitution order secured by an individual's personal freedom, but consists of a debtor attempting to reschedule a debt in a Chapter 13 bankruptcy after having been discharged of several hundred thousand dollars' worth of unsecured debt in his prior Chapter 7 bankruptcy. Johnson not only proposes a plan that cures no default and pays no arrearages, but also does not comply with that plan, being $109,890.00 delinquent in his payments since 1987.

The Bank recognizes the fundamental rule that statutory interpretation begins with the statute's language. *Id.* It has also been recognized that "in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *Kelly v. Robinson*, 479 U.S. 36, 43, 107 S.Ct. 353, 93 L.Ed.2d 216, 225 (1986).

Johnson's position here is unreconcilable. On one hand, he suggests the legislative history of the Bankruptcy Code should not be reviewed, while, on the other hand, he cites both *Metz*, supra and *Saylors*, supra in support of his positions. As have most courts addressing this issue, both *Metz* and *Saylors* relied upon the legislative history of the Bankruptcy Code.

H. CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

No. 90-693

In The

Supreme Court of the United States

October Term, 1990

CURTIS REED JOHNSON,

Petitioner,

vs.

HOME STATE BANK,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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No. 90-693

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Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

A. Supplemental Information

The purpose of this Supplemental Brief is to bring to the Court's attention the decision in *In Re Lawson,* 120 B.R. 859 (Bankr. W.D. Ky. 1990), *aff'd* No. C90-0517-L(J), slip op. (W.D. Ky. October 31, 1990). The debtor's appeal from the District Court's decision was docketed in the Sixth Circuit Court of Appeals on November 19, 1990 as Case No. 90-6441. Whether the Sixth Circuit Court of Appeals affirms or reverses the District Court's decision,

the Sixth Circuit's decision will create a further split among the circuits.

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No. 90-693

In The
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CURTIS REED JOHNSON,

Petitioner,

v.

HOME STATE BANK,

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

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No. 90-693

In The

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v.

HOME STATE BANK,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S SUPPLEMENTAL BRIEF

A. Supplemental Information

Home State Bank submits this Supplemental Brief in response to Petitioner's Supplemental Brief, where he brought to the Court's attention the decision in *In Re Lawson*, 120 B.R. 859 (Bankr. W.D. Ky. 1990), aff'd No. C90-0517-L(J), slip op. (W.D. Ky. October 31, 1990). The Petitioner, Curtis Reed Johnson, argues that the *Lawson* case will create a split among the Circuit Courts of Appeal.

As with all other cases cited by the Petitioner, the *Lawson* case presents different facts and issues than those before the Tenth Circuit. The *Lawson* decision, like other decisions relied upon by Petitioner, reviewed a bankruptcy plan proposing to reinstate the debt and cure all arrearages. In the present case, Mr. Johnson's plan does not provide for a cure of any arrearages or propose to reinstate any debt previously discharged in his Chapter 7 plan.

Therefore, neither the *Lawson* case nor any other case cited by Petitioner presents a conflict with the Tenth Circuit's opinion in this case as contemplated by Rule 10 of the Rules of the Supreme Court.

B. Mootness

The question presented for review by Petitioner is now moot. The subject matter of debtor's bankruptcy and petition for certiorari, two quarter sections of land, were sold by sheriff's sale in Edwards County, Kansas, on November 27, 1990. On December 19, 1990, the Edwards County district court judge confirmed the sheriff's sale over the objections of debtor's counsel. The debtor, subsequently, filed in the district court of Edwards County, Kansas, an appeal to the Court of Appeals of the State of Kansas. Debtor primarily argues that his counsel received inadequate notice of the sale of the land and that an incorrect amount was bid for the land at the sheriff's sale.

This case is now moot, as there remains for this Court no actual matters in controversy essential to the decision of this case. If the Kansas Court of Appeals hears the

debtor's appeal, its decision will render the issues before the Supreme Court moot.

A case becomes moot where, pending an appeal from a judgment of a lower court, an event occurs which renders it impossible for the Supreme Court, if it should decide the case in favor of the petitioner, to grant the petitioner any effectual relief. *Mills v. Green*, 159 U.S 651, 16 S.Ct. 132, 40 L.Ed. 293 (1895); *Tennessee v. Condon*, 189 U.S. 64, 23 S.Ct. 579, 47 L.Ed. 709 (1903). Based upon the sale of the land and Petitioner's failure to make any payments upon that land pursuant to his Chapter 13 bankruptcy plan since 1987, the Petitioner will not be able to retain the land. Thus, a decision in favor of the Petitioner from this Court will not grant him any effectual relief.

C. Conclusion

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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(6)

No. 90-693

In The

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October Term, 1990

CURTIS REED JOHNSON,

Petitioner,

vs.

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Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed October 26, 1990
Certiorari Granted January 22, 1991

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

	Date		Court*	Description
1.	March 2, 1987	-	B	Voluntary Chapter 13 bankruptcy filed in the United States Bankruptcy Court for the District of Kansas, sitting in Wichita, Kansas.
2.	March 3, 1987	-	B	Motion to allow debtor (hereinafter "Johnson") to operate farming business.
3.	March 3, 1987	-	B	Johnson's application to extend payments beyond 36 months.
4.	May 7, 1987	-	B	Objection to plan by Home State Bank of Lewis, Kansas (hereinafter "Bank").
5.	June 2, 1987	-	B	Objection to confirmation of plan by Bank.
6.	June 19, 1987	-	B	Amended schedule of current income and current expenditures and Chapter 13 disclosure of income and expenses filed.
7.	June 22, 1987	-	B	Order entered granting Johnson's motion allowing Johnson to operate farming business.

8. June 23, 1987	-	B	Confirmation hearing on original plan. Bankruptcy court declines to confirm plan but gives Johnson until July 6, 1987 to propose an amended plan. Plan is not confirmable at this time due to current circumstances.
9. June 30, 1987	-	B	Transcript of deposition of Johnson taken by Bank on May 8, 1987 filed.
10. July 6, 1987	-	B	Johnson's first amended Chapter 13 plan filed.
11. August 7, 1987	-	B	Objection to confirmation of plan filed by Bank.
12. August 28, 1987	-	B	Objection to Johnson's first amended Chapter 13 plan filed by Bank.
13. September 3, 1987	-	B	Confirmation hearing held on amended plan. Transcript of prior hearing on original plan to be filed; ten days thereafter arguments to be filed and responses to arguments to be filed ten days thereafter. Feasibility still a problem – attorneys need to resolve secured claim amount of Bank.

14. October 15, 1987	-	B	Transcript of hearings held on June 23, 1987 and September 3, 1987 filed.
15. April 8, 1988	-	B	Memorandum of decision and judgment on decision entered by bankruptcy court confirming Johnson's amended plan.
16. April 18, 1988	-	B	Notice of appeal filed by Bank.
17. April 22, 1988	-	B	Motion of Bank for dismissal of this case.
18. April 26, 1988	-	B	Application to approve Johnson's attorneys' fees, advances, and expenses.
19. April 28, 1988	-	B	Record and issues on appeal filed by Bank.
20. May 23, 1988	-	B	Order sustaining Johnson's second motion for determination as to ownership interest in government entitlement payments and landlord's share of 1987 crop.
21. June 3, 1988	-	D	Record on appeal transmitted from bankruptcy court to district court.
22. June 14, 1988	-	B	Order approving Johnson's attorneys' fees as administrative expenses.

23. June 17, 1988	-	D	Bank's list of exhibits in the appeal from the bankruptcy court to the district court.
24. December 14, 1988	-	B	Motion of Bank to dismiss Johnson's Chapter 13 plan.
25. January 3, 1989	-	D	Memorandum decision and order entered by district court reversing bankruptcy court's decision which confirmed Johnson's amended Chapter 13 plan.
26. January 4, 1989	-	D	Judgment on above memorandum and order entered.
27. February 2, 1989	-	D	Notice of appeal filed by Johnson from district court's decision to Tenth Circuit Court of Appeals.
28. February 3, 1989	-	D	Notice of appeal filed by Bank from district court's decision to Tenth Circuit Court of Appeals.
29. February 7, 1989	-	D	Motion for stay pending appeal filed by Johnson in district court.
30. February 10, 1989	-	A	Court of Appeals dockets Johnson's appeal and assigns case no. 89-3029.

31. February 13, 1989	-	A	Court of appeals dockets cross-appeal and assigns case no. 89-3031.
32. February 27, 1989	-	D	Debtor's motion for stay pending appeal is sustained by district court and creditors are stayed from pursuing any action against Johnson or his property in any district court of the State of Kansas and in the United States Bankruptcy Court for the District of Kansas pending resolution of the appeal to the Tenth Circuit Court of Appeals. Said stay is subject to Johnson's payment of adequate protection payments delineated in the order.
33. April 21, 1989	-	D	Motion filed by Bank to terminate or vacate stay pending appeal.
34. May 4, 1989	-	D	Memorandum and order entered denying Bank's motion to terminate or vacate stay.
35. May 15, 1989	-	D	Motion by Bank to reconsider order denying motion to terminate or vacate stay pending appeal.

36. May 18, 1989	-	D	Minute order denying Bank's motion for reconsideration.
37. December 22, 1989	-	B	Order approving Johnson's attorneys' fees as administrative expenses.
38. February 12, 1990	-	D	Order entered sustaining Johnson's motion to allow bankruptcy trustee to pay Johnson's attorneys' fees and expenses from money held by trustee for stay pending appeal.
39. February 20, 1990	-	D	Motion by Bank for reconsideration of order allowing attorneys' fees and expenses to be paid from funds held by trustee for stay pending appeal.
40. March 6, 1990	-	D	Order entered denying Bank's motion for reconsideration as to payment of attorneys' fees and expenses from funds held by bankruptcy trustee for stay pending appeal.
41. June 7, 1990	-	A	Opinion and judgment entered by Tenth Circuit Court of Appeals affirming decision of district court.

42. June 13, 1990	-	D	Bank files motion for disbursement of funds held by the bankruptcy trustee as adequate protection for stay pending appeal.
43. June 19, 1990	-	B	Application to approve Johnson's attorneys' fees and expenses as administrative expenses filed in bankruptcy court.
44. June 21, 1990	-	A	Debtor files in court of appeals petition for rehearing and suggestion for rehearing *en banc*.

45. July 12, 1990	-	B	Courtroom minute sheet – Trustee is holding approximately \$17,000.00 in a separate account pending resolution of appeal on the confirmation issues. The funds being held by the trustee are from crop proceeds and Bank is not secured in those funds. Bank has no objection to the amount of fees requested by Johnson's attorney, but alleges the funds being held by trustee are a bond for Johnson's appeal and cannot be used for payment of attorneys' fees.
46. August 1, 1990	-	A	Tenth Circuit Court of Appeals enters order denying petition for rehearing and suggestion for rehearing *en banc*.
47. August 9, 1990	-	B	Order sustaining, in part, Johnson's application to approve attorneys' fees.
48. August 13, 1990	-	D	Tenth Circuit Court of Appeals' opinion and mandate filed with district court.

49. October 1, 1990	-	D	Order entered by district court overruling Bank's motion for disbursement of funds held by bankruptcy trustee for stay pending appeal and ordering disbursement of funds to Johnson.
50. October 4, 1990	-	B	Motion to dismiss proceeding by Bank.
51. October 31, 1990	-	B	Motion by Johnson for a stay pursuant to Bankruptcy Rule 8005 pending review on the Petition for Writ of Certiorari to the United States Supreme Court.
52. November 21, 1990	-	B	Adversary proceeding filed by Johnson in bankruptcy court for injunctive relief against Bank seeking order enjoining Bank from selling real property at foreclosure sale in state court.
53. November 30, 1990	-	D	Order received by district court from Tenth Circuit Court of Appeals recalling mandate issued August 9, 1990 pending final determination of Johnson's Petition for Writ of Certiorari.

54. December 3, 1990 - D Mandate returned by district court to court of appeals.

55. December 20, 1990 - B Courtroom minute sheet – Tenth Circuit has recalled its mandate and bankruptcy court finds it has no jurisdiction.

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* A – United States Court of Appeals – Tenth Circuit

B – United States Bankruptcy Court for the District of Kansas sitting in Wichita, Kansas

D – United States District Court for the District of Kansas sitting in Wichita, Kansas

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	)	
CURTIS REED JOHNSON,	)	Case No. 87-1085
	)	
Debtor.	)	Chapter 13
	)	

AMENDED SCHEDULE OF CURRENT INCOME
AND CURRENT EXPENDITURES

Annual Income:

Debtor's Income Available From Farming

Crops and Feed:	$90,209.00	
Custom Work:	15,250.00	
Government Payments:	18,951.00	
Total Farm Income		$124,410.00
Spouse's Take Home Pay:		12,400.00
Total Annual Income:		$136,810.00

Annual Farm Expenses:

Expenses:

Hired Labor	$ 1,550.00
Repairs (Mach. & Equip.)	11,850.00
Rents & Leases	21,450.00
Seed	8,195.00
Fertilizer	19,639.00
Chemicals	6,791.00
Gas, Fuel & Oil	9,892.00
Taxes (R/E & P/P)	2,000.00
Insurance (Prop. & Liab.)	600.00
Utilities (Elec. & Gas)	750.00
Crop Insurance	3,540.00
Professional Accounting	900.00
Total Annual Farm Expenses:	$87,157.00

Monthly Home Expenses:
(both homes)

Trailer Payment	$ 280.00
Lot Rental	120.00
Electricity	210.00
Water	10.00
Heat	150.00
Telephone	200.00
Trash	10.00
Food	450.00
Clothing	225.00
Laundry & Cleaning	35.00
*Newspapers & Books	120.00
Medical Expenses	50.00
Transportation	100.00
Recreation	100.00
Auto Insurance	80.00
Life Insurance	300.00
**Taxes	150.00
***Payments for Support of Dependents Not Living At Home	600.00
Total Monthly Home Expenses	$ 3,190.00
Total Annual Home Expenses	38,280.00

Total Annual Expenses	$125,437.00
Net Income Available for Plan Income	11,373.00

*Includes school books for dependents at $600.00 per semester.

**Personal property taxes on trailer and spouse's car.

***Names, Ages & Relationship of Dependents Not Living at Home:

1. Denise Johnson, 20, daughter
2. Catrina Johnson, 17, daughter

REDMOND, REDMOND, O'BRIEN
& NAZAR

By /s/ W. Thomas Gilman
W. Thomas Gilman
Attorney for Debtor

(Certificate Of Mailing Omitted In Printing)

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

IN RE:	) Case No.
CURTIS REED JOHNSON,	) 87-10585
S.S. No. 510-36-5136,	) Chapter 13
Debtor.	) Filed
	) July 06 1987

DEBTOR'S FIRST AMENDED
CHAPTER 13 PLAN

The debtor submits all or such portion of his future earnings or other future income to the control of the Trustee as is necessary for the execution of the Plan. The debtor shall pay the Trustee the sum of $291.42 per month on or before the 15th day of each month. From that amount, $262.54 per month shall be forwarded to Mid-Kansas Federal Savings and Loan (hereinafter "Mid-Kansas") for payment on the debt due said entity. Additionally, the debtor shall pay the Trustee varying annual payments due on or before the 1st day of December of each year of the Plan, which payments shall be applied first to accrued and unpaid interest on the Home State Bank's (hereinafter "the Bank") first and second mortgages and the remaining portion of the annual payment shall be applied toward the principal amount due on the debtor's first mortgage until paid in full at which time any remaining portion of any annual payment made by the debtor shall be applied towards the principal amount due on the secured portion of the second mortgage due the Bank. Additionally, the debtor's landowner's royalty payments shall be paid directly to the Bank to be applied

first toward accrued and unpaid interest on the debtor's first mortgage and then upon the principal amount due on the debtor's first mortgage. After the first mortgage debt is satisfied, oil and gas payments are to be applied toward accrued and unpaid interest on the secured portion of the second mortgage, and then to principal on the same. The remaining principal amount due on the debtor's second mortgage to the Bank shall be paid in a balloon payment at the end of the Plan. Similarly, the remaining principal amount due on the secured portion of the debt due Mid-Kansas shall be paid in a balloon payment at the end of the Plan.

CLASSIFICATION AND TREATMENTS

1. Priority Creditors: This class includes all claimants entitled to priority status pursuant to 11 U.S.C. §507(a) including debtor's attorney fees. All allowed priority claims shall be paid in full in deferred payments as required by 11 U.S.C. §1322(a)(2).

2. Fully Secured Creditor: This class shall include the first mortgage debt due the Home State Bank. This amount shall be paid in full over the term of the Plan at the contractual rate of simple interest, 9.25% per annum. Payments shall be made by the debtor's assigned oil and gas runs directly from the producers to the Home State Bank. Additional payments shall be made on this debt on an annual basis as set forth hereinafter.

3. Undersecured Creditors: This class shall consist of the second mortgage debt due the Home State Bank and the debt due Mid-Kansas.

A. Home State Bank: The debtor shall pay the remaining scheduled value of the real property and oil and gas reserves after deducting the amount due on the Home State Bank's first mortgage as of the date of filing. The unpaid principal amount plus unpaid accrued interest shall be paid in a balloon payment at the conclusion of the Plan. Interest on the principal amount will be paid at the simple annual rate of 9.5%.

B. Mid-Kansas: The debtor shall pay the agreed upon value of the collateral securing this debt, $19,007.00, as follows: $12,500.00 shall be paid in monthly payments of $262.54 at the rate of 9.5% per annum. The remaining value of the collateral, $6,507.00, shall be paid in a balloon payment at the conclusion of the Plan.

MISCELLANEOUS PROVISIONS

1. Term: The term of this Plan shall be sixty (60) months.

2. Title to Property: Title to the debtor's property shall revest in him upon confirmation of this Plan, dismissal of this action or discharge.

3. Release of Liens: Upon completion of the Plan, the creditors shall release their respective mortgages and security interest and file the same of record.

4. Debtor's counsel would ask that counsel for the creditors forward him copies of their Proofs of Claim and all attachments.

5. Ad valorem and severence taxes on oil and gas production shall be paid from the proceeds thereof by the

Bank or the producers pursuant to normal custom and practice.

6. The Bank shall provide debtor's counsel and the Trustee with a monthly accounting of oil and gas royalty payments and how said payments are applied pursuant to the terms of the Plan.

7. All accountings required herein from the Bank shall be due within thirty (30) day after receipt of the respective funds.

PAYMENT ANALYSIS

A. Monthly Payment to Trustee: $291.42

1. Amount paid to Mid-Kansas: $262.54.

2. Trustee's fee: $28.88.

B. Lump sum payoff of Mid-Kansas debt: $7,222.77 to be paid to Trustee at conclusion of Plan.

1. Amount paid to Mid-Kansas: $6,507.00.

2. Trustee's fee: $715.77.

C. Monthly oil and gas royalty payments: To be paid directly by the producers to the Bank. The Bank shall deduct eleven percent (11%) of said payments and forward a check in said amount to the Trustee as his fee. The Bank shall apply the remaining amount of such payments first to accrued interest due on debtor's first mortgage and then to the principal amount due on said first mortgage. At such time as the first mortgage debt is satisfied, the Bank shall apply said payments in like fashion to the secured portion of the second mortgage debt, $91,459.61

(computed as follows: $190,500.00 of total secured debt, minus $99,040.33, total due on first mortgage debt on filing date as set forth on page 3 of the Bank's Exhibit 3 from the trial herein.) The Bank shall not be responsible for paying the Trustee's fee from oil and gas production until confirmation of this Plan. The Debtor shall pay any portion of the Trustee's pre-confirmation fee due from oil and gas production from the December 1, 1987 annual payment. The Bank shall provide the debtor's counsel and the Trustee with a monthly accounting of oil and gas revenue received and applied according to the terms hereof.

D. Annual payments to Trustee: Annual payments shall be made by the debtor to the Trustee and be due on or before December 1 of each year. The last annual payment shall be due on or before December 1, 1991. The Trustee shall deduct his fee (11%) and forward the balance to the Bank. The Bank shall apply said funds as follows:

1. First, toward payment of accrued and unpaid interest on the second mortgage debt;

2. Second, toward payment of accrued and unpaid interest on the first mortgage debt; and

3. Third, toward the unpaid principal of the first mortgage debt.

At such time as the first mortgage debt is satisfied, the bank shall apply annual payments first toward accrued and unpaid interest on the second mortgage debt and then to the principal amount due on said debt. The Bank shall provide the debtor's counsel and the Trustee with an accounting of funds received from the Trustee and application of the same according to the terms hereof.

Annual payments are to be made as follows:

<u>1987: $11,100.00</u>

1. Amount paid to the Bank: $10,000.00.
2. Amount paid to the Trustee: $1,100.00.

<u>1988: $35,520.00</u>

1. Amount paid to the Bank: $32,000.00.
2. Amount paid to the Trustee: $3,520.00.

<u>1989: $35,520.00</u>

1. Amount paid to the Bank: $32,000.00.
2. Amount paid to the Trustee: $3,520.00.

<u>1990: $38,850.00</u>

1. Amount paid to the Bank: $35,000.00.
2. Amount paid to the Trustee: $3,850.00.

<u>1991: $19,425.00</u>

1. Amount paid to the Bank: $17,500.00.
2. Amount paid to the Trustee: $1,925.00.

E. Lump sum payoff to the Bank: On or before March 1, 1992, the debtor shall pay the Trustee the remaining balance plus accrued and unpaid interest due the Bank on its second mortgage debt, plus eleven percent (11%) thereof as the Trustee's fee. The Trustee shall retain the eleven percent (11%) fee and forward the remainder to the Bank in satisfaction of the second mortgage debt then outstanding. The debtor's projections indicate that a total payment will be due in

the amount of $80,625.92 of which $72,635.96 shall be paid to the Bank and $7,989.96 to the Trustee. The debtor will need to borrow 55.99% of the 1987 market value of his real property excluding the value for any oil and gas reserves remaining. (See Projected Amortization Analysis of Home State Bank Debt attached hereto as "Exhibit A.")

FIVE YEAR CASH FLOW ANALYSIS

	1987	1988	1989	1990	1991
Annual Farm Income:					
Crops & Feed	$ 90,209	$ 99,115	$ 98,526	$ 96,678	$ 94,925
Custom Work	15,250	15,250	15,250	15,250	15,250
Government Payments	18,951	44,781	47,605	49,243	29,494
Total Farm Income:	$124,410	$159,146	$161,381	$161,171	$139,669
Annual Farm Expenses:					
Hired Labor:	$ 1,550	$ 1,550	$ 1,550	$ 1,550	$ 1,550
Repairs (Mach. & Equipment)	11,850	7,848	8,100	8,220	8,280
Rents & Leases	21,450	21,450	21,450	21,450	21,450
Seed	8,195	8,278	9,913	8,546	8,710
Fertilizer	19,639	20,802	21,902	21,320	21,540
Chemicals	6,791	6,909	7,026	7,100	7,155
Gas, Fuel & Oil	9,892	10,427	11,182	11,224	11,633
Taxes (R/E & P/P)	1,600	1,600	1,600	1,600	1,600
Insurance (Prop. & (Liab.)	600	600	600	600	600
Utilities	750	900	900	900	900
Crop Insurance	3,540	3,540	4,490	4,460	3,540

	1987	1988	1989	1990	1991
Professional Accounting	900	900	900	900	900
Family Living Expenses	16,800	14,700	15,180	15,060	15,660
Income & Social Security Tax	1,200	12,500	12,500	12,500	12,500
Monthly Payment to Trustee	1,752*	3,504	3,504	3,504	3,504
Total Annual Farm Expense:	$106,509	$115,508	$120,797	$118,934	$119,522
Excess:	$ 17,901	$ 43,638	$ 40,584	$ 42,237	$ 20,147
Annual Plan Payment:	$ 11,100	$ 35,520	$ 35,520	$ 38,850	$ 19,425
Margin:	$ 6,801	$ 8,118	$ 5,064	$ 3,387	$ 722

*From 7-1-87

ADDITIONAL DISCLOSURES PERTINENT TO AMENDED PLAN

1. Crop Prices: 1987 crop prices are calculated as set forth in the Chapter 13 Disclosure of Income and Expenses previously filed herein. Subsequent year's prices are based on U.S.D.A. and FmHA projections as set forth in Announcement Number 1524(1951) Exhibit A, Page 1.

2. Crop Yields: Crop yields are based on historical production as set forth in the Chapter 13 Disclosure of Income and Expenses.

3. Crop Acreage: Crop acreage is based on farm crop property as set forth in the Chapter 13 Disclosure of Income and Expenses.

4. Farm Expenses: Farm expenses are based on historical expenses as set forth in the Chapter 13 Disclosure of Income and Expenses. These figures also include adjustments for inflation an [sic] price modifications as set forth in projections made by the U.S.D.A. and FmHA in the aforesaid Announcement.

5. Custom Work: Custom work income is based on historical income as set forth in the Chapter 13 Disclosure of Income and Expenses.

6. Government Payments: The debtor has included amounts for government payments based on the current farm program. The current farm program has been authorized by Congress to continue through 1990 with some 1990 program payments to carry over into 1991. The debtor's government payments increase substantially in 1988 and subsequent years over the amounts available in

1987 due to the debtor's recent "reentry" into the farming programs and the structure thereof whereby partial payments are made in the year of enrollment and the balance in the subsequent year. Thus, in 1987, the debtor was entitled only to the "enrollment year" payments. In 1988 and subsequent years, the debtor will be entitled to "enrollment year" payments as well as payments due from the previous year's participation. Government payments for 1991 are set forth herein based upon current Congressional authorization. Since the farm program is authorized only through 1990, the debtor would only receive payments in 1991 based on the 1980 [sic, should be 1990] program (i.e. he would not receive 1991 "enrollment year" payments). However, if Congress extends the government program through 1991, the debtor would expect to receive substantially more income in 1991, the effect of which would be to increase the annual payment due on or before December 1, 1991 and lower the lump sum payment, and corresponding loan, due on or before March 1, 1992.

7. Family Living Expense: This figure includes only those expenses necessary for the debtor to live in the farm residence. As to the debtor's life insurance, he will provide the Court with affidavits from himself and his insurance agent whereby they will swear, under oath, that the debtor is not making payments on any policy of insurance whereby the debtor is building a cash value available to him or any other person.

REDMOND, REDMOND, O'BRIEN
& NAZAR

By /s/ W. T. Gilman
W. Thomas Gilman

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Wichita, KS 67202
(316) 262-8361
S.C. #11867

(Certificate Of Mailing Omitted In Printing)

"Exhibit A"

PROJECTED AMORTIZATION ANALYSIS OF HSB DEBT

Date	*Monthly Oil & Gas Payment	Annual Payment	Trustee Fee	Net Payment	Pymt. on Accrued Int. on 1st mtg.	Pymt. on Prin. on 1st mtg.	Pymt. on Accrued Int. on 2nd mtg.	Pymt. on Prin. on 2nd mtg.	Prin. Bal. Due on 1st Mortgage	Prin. Bal. Due on 2nd Mortgage
1987										
6-15									96,364.35	91,459.67
7-15	1,623.00		178.53	1,444.47	537.24	907.23	–	–	95,457.12	91,459.67
8-15	1,623.00		178.53	1,444.47	749.93	694.54	–	–	94,762.58	91,459.67
9-15	1,623.00		178.53	1,444.47	720.60	723.87	–	–	94,038.71	91,459.67
10-15	1,623.00		178.53	1,444.47	714.90	729.57	–	–	93,309.14	91,459.67
11-15	1,623.00		178.53	1,444.47	709.50	734.97	–	–	92,574.17	91,459.67
12-1		11,100.00	1,100.00	10,000.00	351.90	3,100.35	6,547.75	–	89,473.82	91,459.67
12-15	1,623.00		178.53	1,444.47	317.52	1,126.95	–	–	88,346.87	91,459.67
1988										
1-15	1,090.00		119.90	970.10	671.70	298.40	–	–	88,048.47	91,459.67
2-15	1,090.00		119.90	970.10	669.30	300.80	–	–	87,747.67	91,459.67
3-15	1,090.00		119.90	970.10	667.20	302.90	–	–	87,444.77	91,459.67
4-15	1,090.00		119.90	970.10	664.80	305.30	–	–	87,139.47	91,459.67
5-15	1,090.00		119.90	970.10	662.40	307.70	–	–	86,831.77	91,459.67
6-15	1,090.00		119.90	970.10	660.30	309.80	–	–	86,521.97	91,459.67
7-15	1,090.00		119.90	970.10	657.90	312.20	–	–	86,209.77	91,459.67

Date	*Monthly Oil & Gas Payment	Annual Payment	Trustee Fee	Net Payment	Pymt. on Accrued Int. on 1st mtg.	Pymt. on Prin. on 1st mtg.	Pymt. on Accrued Int. on 2nd mtg.	Pymt. on Prin. on 2nd mtg.	Prin. Bal. Due on 1st Mortgage	Prin. Bal. Due on 2nd Mortgage
8-15	1,090.00		119.90	970.10	655.50	314.60	–	–	85,895.17	91,459.67
9-15	1,090.00		119.90	970.10	653.10	317.00	–	–	85,578.17	91,459.67
10-15	1,090.00		119.90	970.10	650.70	319.40	–	–	85,258.77	91,459.67
11-15	1,090.00		119.90	970.10	648.30	321.80	–	–	84,936.97	91,459.67
12-1		35,520.00	3,520.00	32,000.00	322.95	22,988.38	8,688.67	–	61,948.59	91,459.67
12-15	1,090.00		119.90	970.10	219.80	750.30	–	–	61,198.29	91,459.67
1989										
1-15	738.00		81.18	656.82	465.30	191.52	–	–	61,006.77	91,459.67
2-15	738.00		81.18	656.82	463.80	193.02	–	–	60,813.75	91,459.67
3-15	738.00		81.18	656.82	462.30	194.52	–	–	60,619.23	91,459.67
4-15	738.00		81.18	656.82	460.80	196.02	–	–	60,423.21	91,459.67
5-15	738.00		81.18	656.82	459.30	197.52	–	–	60,225.69	91,459.67
6-15	738.00		81..8	656.82	457.80	199.02	–	–	60,026.67	91,459.67
7-15	738.00		81.18	656.82	456.30	200.52	–	–	59,826.15	91,459.67
8-15	738.00		81.18	656.82	454.80	202.02	–	–	59,624.13	91,459.67
9-15	738.00		81.18	656.82	453.30	203.52	–	–	59,420.61	91,459.67
10-15	738.00		81.18	656.82	451.80	205.02	–	–	59,215.59	91,459.67
11-15	738.00		81.18	656.82	450.30	206.52	–	–	59,009.07	91,459.67
12-1		35,520.00	3,520.00	32,000.00	224.25	23,087.08	8,688.67	–	35,921.99	91,459.67
12-15	738.00		81.18	656.82	136.50	520.32	–	–	35,401.67	91,459.67

Date	*Monthly Oil & Gas Payment	Annual Payment	Trustee Fee	Net Payment	Pymt. on Accrued Int. on 1st mtg.	Pymt. on Prin. on 1st mtg.	Pymt. on Accrued Int. on 2nd mtg.	Pymt. on Prin. on 2nd mtg.	Prin. Bal. Due on 1st Mortgage	Prin. Bal. Due on 2nd Mortgage
1990										
1-15	510.83		56.19	454.64	269.10	185.54	–	–	35,216.13	91,459.67
2-15	510.83		56.19	454.64	267.90	186.74	–	–	35,029.39	91,459.67
3-15	510.83		56.19	454.64	266.40	188.24	–	–	34,841.15	91,459.67
4-15	510.83		56.19	454.64	264.90	189.74	–	–	34,651.41	91,459.67
5-15	510.83		56.19	454.64	263.40	191.24	–	–	34,460.17	91,459.67
6-15	510.83		56.19	454.64	261.90	192.74	–	–	34,267.43	91,459.67
7-15	510.83		56.19	454.64	260.40	194.24	–	–	34,073.19	91,459.67
8-15	510.83		56.19	454.64	259.20	195.44	–	–	33,877.75	91,459.67
9-15	510.83		56.19	454.64	257.70	196.94	–	–	33,680.81	91,459.67
10-15	510.83		56.19	454.64	256.20	198.44	–	–	33,482.37	91,459.67
11-15	510.83		56.19	454.64	254.70	199.94	–	–	33,282.37	91,459.67
12-1		38,850.00	3,850.00	35,000.00	126.60	26,184.73	8,688.67	–	7,097.64	91,459.67
12-15	510.83		56.19	454.64	27.00	427.64	–	–	6,670.00	91,459.67
1991										
1-15	1,523.83		167.62	1,356.21	50.70	1,305.51	–	–	5,364.49	91,459.67
2-15	1,523.83		167.62	1,356.21	40.80	1,315.41	–	–	4,049.08	91,459.67
3-15	1,523.83		167.62	1,356.21	30.90	1,325.31	–	–	2,723.77	91,459.67
4-15	1,523.83		167.62	1,356.21	20.70	1,335.51	–	–	1,388.26	91,459.67
5-15	1,523.83		167.62	1,356.21	10.50	1,345.71	–	–	42.55	91,459.67

Date	*Monthly Oil & Gas Payment	Annual Payment	Trustee Fee	Net Payment	Pymt. on Accrued Int. on 1st mtg.	Pymt. on Prin. on 1st mtg.	Pymt. on Accrued Int. on 2nd mtg.	Pymt. on Prin. on 2nd mtg.	Prin. Bal. Due on 1st Mortgage	Prin. Bal. Due on 2nd Mortgage
6-15	1,523.83		167.62	1,356.21	.30	42.55	1,313.36	–	–	91,459.67
7-15	1,523.83		167.62	1,356.21	–	–	1,356.21	–	–	91,459.67
8-15	1,523.83		167.62	1,356.21	–	–	1,356.21	–	–	91,459.67
9-15	1,523.83		167.62	1,356.21	–	–	1,356.21	–	–	91,459.67
10-15	1,523.83		167.62	1,356.21	–	–	1,356.21	–	–	91,459.67
11-15	1,523.83		167.62	1,356.21	–	–	1,356.21	–	–	91,459.67
12-1		19,425.00	1,925.00	17,500.00	–	–	524.86	17,447.19	–	74,012.48
12-15	1,523.83		167.62	1,356.21	–	–	269.64	1,086.57	–	72,925.91
1992										
1-15	960.17		105.62	854.55	–	–	569.40	285.15	–	72,640.76
2-15	960.17		105.62	854.55	–	–	567.30	287.25	–	72,353.51

Lump Sum Due March 1, 1992 – $72,635.96
Trustee's Fee – $7,989.96
Total Payment Due – $80,625.92

1987 Market Value of real property owned by debtor excluding value for oil and gas reserves – $144,000.00.
Percentage loan necessary to make lump sum payment – 55.99%

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*Based on annual net cash flow figures as set forth on the appraisal prepared by Myers Engineering. Payments from producers have been received by the bank roughly at the middle of each month.

CASH FLOW STATEMENT

Name: Curtis R. Johnson — Projected For 1987
Address: Rural Route 1 Box 22 — Belpre KS. 67519 — Phone: 316-995-3362 — Date: 08/30/87

Profit Center: Not Defined

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Beg. Cash Balance	0	1500	1500	150	-1200	174	-754	630	129	5024	5405	6679	37	3397
Operating Receipts:														
Crops And Feed	0	90209	0	0	0	0	0	0	4187	0	18500	0	5962	61560
Livestock & Poultry	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Products (Livestock)	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Custom Work	0	15250	0	0	0	0	2250	2750	4000	4250	2000	0	0	0
Government Payments	0	18951	0	0	0	10174	6363	0	1680	0	0	0	0	734
Hedging Account W/D	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Capital Receipts:														
Breeding Stock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Machinery & Equip.	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0

1987, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Non-Farm Income:														
Off-Farm Wages	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Interest & Dividends	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Oil & Gas Income	0	9738	0	0	0	0	0	0	1623	1623	1623	1623	1623	1623
Inflow From Escrow	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total Cash Available	0	135648	1500	150	-1200	10348	7859	3380	11619	10897	27528	8302	7622	67314

1987, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Operating Expenses:														
Labor Hired	0	1550	0	0	0	0	0	300	500	0	250	500	0	0
Repairs-Mach & Equip	0	11850	0	0	785	785	4785	785	785	785	785	785	785	785
Repairs-Build/Improv	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Rents & Leases	0	21450	0	0	0	0	0	0	0	0	0	0	0	21450
Seed	0	8195	0	0	0	6450	658	0	0	0	1087	0	0	0
Fertilizer & Lime	0	19639	0	0	0	6088	9393	0	2826	289	1043	0	0	0
Chemicals	0	6791	0	0	0	3063	0	0	0	3728	0	0	0	0
Custom Machine Hire	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Supplies	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Livestock Expense	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Gas, Fuel, Oil	0	9892	0	0	1125	0	5077	0	1845	0	1845	0	0	0
Storage/Custom Dry	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Taxes (Real Est, PP)	0	1600	0	0	0	0	0	800	0	0	0	0	0	800
Insurance (Prop, Liab)	0	600	0	0	0	0	600	0	0	0	0	0	0	0
Utilities (Elect/Gas)	0	750	0	0	75	75	75	75	75	75	75	75	75	75
Market/Transport Exp	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Auto (Farm Share)	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Crop Insurance	0	3540	0	0	0	0	0	0	0	0	0	3540	0	0
Prof & Acct.	0	900	25	25	25	25	625	25	25	25	25	25	25	25
Total Cash Oper Exps	0	8675[illegible]	25	25	2010	16486	21213	1985	6056	4902	5110	4925	885	23135

1987, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Stock & Feed Purch:														
Feeder Livestock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Breeding Livestock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Feed Purchased	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Capital Expenditures														
Machinery & Equip	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Buildings & Improve.	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Other Expenditures:														
Hedging Acct Deposit	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Gross Family Liv W/D	0	16800	1325	1325	1325	1325	1475	1475	1425	1425	1425	1425	1425	1425
Non-Farm Bus/Invest	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Income Tax & Soc Sec	0	1200	0	0	0	0	0	0	1200	0	0	0	0	0
Payment To Trustee	0	5084	0	0	291	291	291	291	470	470	470	470	470	1570
Loan Payments - Prin	0	8017	0	0	0	0	0	0	907	695	723	730	735	4227
Loan Payments - Int	0	10550	0	0	0	0	0	0	537	750	621	715	710	7217
Total Cash Required	0	128408	1350	1350	3626	18102	22979	3751	10595	8242	8349	8265	4225	37574

1987, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Cash Avail - Cash Req		7240	150	-1200	-4826	-7754	-15120	-371	1024	2655	19179	37	3397	29740
Inflows From Savings		0	0	0	0	0	0	0	0	0	0	0	0	0
Cash Pos Before Borr		7240	150	-1200	-4826	-7754	-15120	-371	1024	2655	19179	37	3397	29740
Money To Be Borrowed														
- Operating Loans		35000	0	0	5000	7000	15750	500	4000	2750	0	0	0	0
- Int & L/T Loans		0	0	0	0	0	0	0	0	0	0	0	0	0
Op Loan Pay - Prin		35000	0	0	0	0	0	0	0	0	12500	0	0	22500
- Interest		1733	0	0	0	0	0	0	0	0	0	0	0	1733
Outflows To Savings		0	0	0	0	0	0	0	0	0	0	0	0	0
Ending Cash Balance		5507	150	-1200	174	-754	630	129	5024	5405	6679	37	3397	5507
Loan Balances:														
Curr Interest Rate	10.00													
Current Yr's Op Loan			0	0	5000	12000	27750	28250	32250	35000	22500	22500	22500	0
- Accrued Interest		1733	0	0	42	100	231	235	269	292	188	188	188	0
Prev Yr's Oper Loans			0	0	0	0	0	0	0	0	0	0	0	0
- Accrued Interest			0	0	0	0	0	0	0	0	0	0	0	0
Int & Long Term Loan	187824		187824	187824	187824	187824	187824	187824	186917	186222	185499	184769	184034	179807
Total Loans			187824	187824	192824	199824	215574	216074	219167	221222	207999	207269	206534	179807
Consistency Check:														
Total Inflows			1500	150	3800	17348	23609	3880	15619	13647	27528	8302	7622	67314
Total Outflows			1500	150	3800	17348	23609	3880	15619	13647	27528	8302	7622	67314
Budgeting Error			0	0	0	0	0	0	0	0	0	0	0	0

1987
FAMILY LIVING BUDGET

Curtis R. Johnson

Date: 08/30/87

Profit Center: Not Defined

Description	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Total
Food	200	200	200	200	200	200	200	200	200	200	200	200	2,400
Household Oper. Exp	0	0	0	0	0	0	0	0	0	0	0	0	0
Household Equip/Furn	0	0	0	0	0	0	0	0	0	0	0	0	0
House Repairs	75	75	75	75	75	75	75	75	75	75	75	75	900
Rent	0	0	0	0	0	0	0	0	0	0	0	0	0
Clothing	60	60	60	60	60	60	60	60	60	60	60	60	720
Personal	100	100	100	100	100	100	100	100	100	100	100	100	1,200
Entertain/Recreation	125	125	125	125	125	125	125	125	125	125	125	125	1,500
Educ/Read. Materials	15	15	15	15	15	15	15	15	15	15	15	15	180
Medical Care & Drugs	75	75	75	75	75	75	75	75	75	75	75	75	900
Church And Charity	0	0	0	0	0	0	0	0	0	0	0	0	0
Personal Gifts	0	0	0	0	0	0	0	0	0	0	0	0	0
Utilities (Non-Farm)	275	275	275	275	275	275	275	275	275	275	275	275	3,300
Tran/Auto (Non-Farm)	50	50	50	50	50	50	50	50	50	50	50	50	600
Prsnl/Rec Vhcl Purch	0	0	0	0	0	0	0	0	0	0	0	0	0
Medical/Disabil Ins	200	200	200	200	200	200	200	200	200	200	200	200	2,400
Life Insurance	150	150	150	150	300	300	250	250	250	250	250	250	2,700

1987, cont.

Description	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Total
Dependent Support	0	0	0	0	0	0	0	0	0	0	0	0	0
Add. To Prsnl Invest	0	0	0	0	0	0	0	0	0	0	0	0	0
Add. To Retire Accts	0	0	0	0	0	0	0	0	0	0	0	0	0
Gross Family Living	1,325	1,325	1,325	1,325	1,475	1,475	1,425	1,425	1,425	1,425	1,425	1,425	16,800

CASH FLOW STATEMENT

Name: Curtis R. Johnson — Projected For 1988

Address: Rural Route 1 Box 22 — Belpre KS. 67519 — Phone: 316-995-3362 — Date: 08/30/87

Profit Center: Not Defined

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Beg. Cash Balance	0	1500	1500	-769	17190	12558	757	638	19	10317	8237	4885	54710	59834
Operating Receipts:														
Crops And Feed	0	99115	0	0	0	0	0	0	13220	0	0	52800	7393	25702
Livestock & Poultry	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Products (Livestock)	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Custom Work	0	15250	0	0	0	0	2250	2750	4000	4250	2000	0	0	0
Government Payments	0	44781	0	20228	0	7709	0	0	615	0	0	13334	0	2895
Hedging Account W/D	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Capital Receipts:														
Breeding Stock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Machinery & Equip.	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0

1988, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Non-Farm Income:														
Off-Farm Wages	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Interest & Dividends	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Oil & Gas Income	0	13080	1090	1090	1090	1090	1090	1090	1090	1090	1090	1090	1090	1090
Inflow From Escrow	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total Cash Available	0	173726	2590	20549	18280	21357	4097	4478	18944	15657	11327	72109	63193	89521

1988, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Operating Expenses:														
Labor Hired	0	1550	0	0	0	0	0	300	500	0	250	500	0	0
Repairs-Mach & Equip	0	7848	654	654	654	654	654	654	654	654	654	654	654	654
Repairs-Build/Improv	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Rents & Leases	0	21450	0	0	0	0	0	0	0	0	0	0	0	21450
Seed	0	8278	0	0	0	6516	664	0	0	0	1098	0	0	0
Fertilizer & Lime	0	20802	0	0	1163	6088	9393	0	2826	289	1043	0	0	0
Chemicals	0	6909	0	0	0	3137	0	0	0	3772	0	0	0	0
Custom Machine Hire	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Supplies	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Livestock Expense	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Gas, Fuel, Oil	0	10427	0	0	1200	0	5343	0	1942	0	1942	0	0	0
Storage/Custom Dry	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Taxes (Real Est, PP)	0	1600	0	0	0	0	0	800	0	0	0	0	0	800
Insurance (Prop, Liab)	0	600	0	0	0	0	600	0	0	0	0	0	0	0
Utilities (Elect/Gas)	0	900	75	75	75	75	75	75	75	75	75	75	75	75
Market/Transport Exp	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Auto (Farm Share)	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Crop Insurance	0	3540	0	0	0	0	0	0	0	0	0	3540	0	0
Prof & Acct.	0	900	25	25	25	25	625	25	25	25	25	25	25	25
Total Cash Oper Exps	0	84804	754	754	3117	16495	17354	1854	6022	4815	5087	4794	754	23004

1988, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Stock & Feed Purch:														
Feeder Livestock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Breeding Livestock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Feed Purchased	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Capital Expenditures														
Machinery & Equip	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Buildings & Improve.	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Other Expenditures:														
Hedging Acct Deposit	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Gross Family Liv W/D	0	14700	1225	1225	1225	1225	1225	1225	1225	1225	1225	1225	1225	1225
Non-Farm Bus/Invest	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Income Tax & Soc Sec	0	12500	0	0	0	12500	0	0	0	0	0	0	0	0
Payment To Trustee	0	8440	410	410	410	410	410	410	410	410	410	410	410	3930
Loan Payments - Prin	0	27149	298	301	303	305	308	310	312	315	317	319	322	23739
Loan Payments - Int	0	16492	672	669	667	665	662	660	658	655	653	651	648	9232
Total Cash Required	0	164085	3359	3359	5722	31600	19959	4459	8627	7420	7692	7399	3359	61130

1988, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Cash Avail - Cash Req		9641	-769	17190	12558	-10243	-15862	19	10317	8237	3635	64710	59834	28391
Inflows From Savings		0	0	0	0	0	0	0	0	0	0	0	0	0
Cash Pos Before Borr		9641	-769	17190	12558	-10243	-15862	19	10317	8237	3635	64710	59834	28391
Money To Be Borrowed														
- Operating Loans		28750	0	0	0	11000	16500	0	0	0	1250	0	0	0
- Int & L/T Loans		0	0	0	0	0	0	0	0	0	0	0	0	0
Op Loan Pay - Prin		28750	0	0	0	0	0	0	0	0	0	10000	0	18750
- Interest		1560	0	0	0	0	0	0	0	0	0	0	0	1560
Outflows To Savings		0	0	0	0	0	0	0	0	0	0	0	0	0
Ending Cash Balance		8081	-769	17190	12558	757	638	19	10317	8237	4885	54710	59834	8081
Loan Balances:														
Curr Interest Rate	10.00													
Current Yr's Op Loan			0	0	0	11000	27500	27500	27500	27500	28750	18750	18750	0
- Accrued Interest		1560	0	0	0	92	229	229	229	229	240	156	156	0
Prev Yr's Oper Loans			0	0	0	0	0	0	0	0	0	0	0	0
- Accrued Interest			0	0	0	0	0	0	0	0	0	0	0	0
Int & Long Term Loan	179807		179509	179208	178905	178600	178292	177982	177670	177355	177038	176719	176397	152658
Total Loans			179509	179208	178905	189600	205792	205482	205170	204855	205788	195469	195147	152658
Consistency Check:														
Total Inflows			2590	20549	18280	32357	20597	4478	18944	15657	12577	72109	63193	89521
Total Outflows			2590	20549	18280	32357	20597	4478	18944	15657	12577	72109	63193	89521
Budgeting Error			0	0	0	0	0	0	0	0	0	0	0	0

1988

FAMILY LIVING BUDGET

Curtis R. Johnson

Date: 08/30/87

Profit Center: Not Defined

Description	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Total
Food	175	175	175	175	175	175	175	175	175	175	175	175	2,100
Household Oper. Exp	0	0	0	0	0	0	0	0	0	0	0	0	0
Household Equip/Furn	0	0	0	0	0	0	0	0	0	0	0	0	0
House Repairs	50	50	50	50	50	50	50	50	50	50	50	50	600
Rent	0	0	0	0	0	0	0	0	0	0	0	0	0
Clothing	60	60	60	60	60	60	60	60	60	60	60	60	720
Personal	100	100	100	100	100	100	100	100	100	100	100	100	1,200
Entertain/Recreation	75	75	75	75	75	75	75	75	75	75	75	75	900
Educ/Read. Materials	15	15	15	15	15	15	15	15	15	15	15	15	180
Medical Care & Drugs	75	75	75	75	75	75	75	75	75	75	75	75	900
Church And Charity	0	0	0	0	0	0	0	0	0	0	0	0	0
Personal Gifts	0	0	0	0	0	0	0	0	0	0	0	0	0
Utilities (Non-Farm)	225	225	225	225	225	225	225	225	225	225	225	225	2,700
Tran/Auto (Non-Farm)	50	50	50	50	50	50	50	50	50	50	50	50	600
Prsnl/Rec Vhcl Purch	0	0	0	0	0	0	0	0	0	0	0	0	0
Medical/Disabil Ins	200	200	200	200	200	200	200	200	200	200	200	200	2,400
Life Insurance	200	200	200	200	200	200	200	200	200	200	200	200	2,400

1988, cont.

Description	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Total
Dependent Support	0	0	0	0	0	0	0	0	0	0	0	0	0
Add. To Prsnl Invest	0	0	0	0	0	0	0	0	0	0	0	0	0
Add. To Retire Accts	0	0	0	0	0	0	0	0	0	0	0	0	0
Gross Family Living	1,225	1,225	1,225	1,225	1,225	1,225	1,225	1,225	1,225	1,225	1,225	1,225	14,700

CASH FLOW STATEMENT

Name: Curtis R. Johnson
Projected For 1989
Address: Rural Route 1 Box 22 Belpre KS. 67519 Phone: 316-995-3362 Date: 08/30/87

Profit Center: Not Defined

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Beg. Cash Balance	0	1500	1500	-3854	13677	8909	-1031	715	34	10692	8440	2954	10057	15202
Operating Receipts:														
Crops And Feed	0	98526	0	0	0	0	0	0	12991	0	0	25560	7475	52500
Livestock & Poultry	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Products (Livestock)	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Custom Work	0	15250	0	0	0	0	2250	2750	4000	4250	2000	0	0	0
Government Payments	0	47605	0	19862	0	8405	0	0	2447	0	0	13914	0	2977
Hedging Account W/D	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Capital Receipts:														
Breeding Stock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Machinery & Equip.	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0

1989, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Non-Farm Income:														
Off-Farm Wages	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Interest & Dividends	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Oil & Gas Income	0	8856	738	738	738	738	738	738	738	738	738	738	738	738
Inflow From Escrow	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total Cash Available	0	171737	2238	16746	14415	18052	1957	4203	20210	15680	11178	43166	18270	71417

1989, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Operating Expenses:														
Labor Hired	0	1550	0	0	0	0	0	300	500	0	250	500	0	0
Repairs-Mach & Equip	0	8100	675	675	675	675	675	675	675	675	675	675	675	675
Repairs-Build/Improv	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Rents & Leases	0	21450	0	0	0	0	0	0	0	0	0	0	0	21450
Seed	0	9913	0	0	0	6594	694	0	0	0	2625	0	0	0
Fertilizer & Lime	0	21902	3023	0	1163	4776	9542	0	2914	289	195	0	0	0
Chemicals	0	7026	0	0	0	3144	0	0	0	3882	0	0	0	0
Custom Machine Hire	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Supplies	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Livestock Expense	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Gas, Fuel, Oil	0	11182	0	0	1275	0	5737	0	2085	0	2085	0	0	0
Storage/Custom Dry	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Taxes (Real Est, PP)	0	1600	0	0	0	0	0	800	0	0	0	0	0	800
Insurance (Prop, Liab)	0	600	0	0	0	0	600	0	0	0	0	0	0	0
Utilities (Elect/Gas)	0	900	75	75	75	75	75	75	75	75	75	75	75	75
Market/Transport Exp	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Auto (Farm Share)	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Crop Insurance	0	4490	0	0	0	0	0	0	950	0	0	3540	0	0
Prof & Acct.	0	900	25	25	25	25	625	25	25	25	25	25	25	25
Total Cash Oper Exps	0	89613	3798	775	3213	15289	17948	1875	7224	4946	5930	4815	775	23025

1989, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Stock & Feed Purch:														
Feeder Livestock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Breeding Livestock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Feed Purchased	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Capital Expenditures														
Machinery & Equip	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Buildings & Improve.	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Other Expenditures:														
Hedging Acct Deposit	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Gross Family Liv W/D	0	15180	1265	1265	1265	1265	1265	1265	1265	1265	1265	1265	1265	1265
Non-Farm Bus/Invest	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Income Tax & Soc Sec	0	12500	0	0	0	12500	0	0	0	0	0	0	0	0
Payment To Trustee	0	7984	372	372	372	372	372	372	372	372	372	372	372	3892
Loan Payments - Prin	0	25797	192	193	194	196	198	199	201	202	204	205	206	23607
Loan Payments - Int	0	14084	465	464	462	461	459	458	456	455	453	452	450	9049
Total Cash Required	0	165158	6092	3069	5506	30083	20242	4169	9518	7240	8224	7109	3068	60838

1989, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Cash Avail - Cash Req		6579	-3854	13677	8909	-12031	-18285	34	10692	8440	2954	36057	15202	10579
Inflows From Savings		0	0	0	0	0	0	0	0	0	0	0	0	0
Cash Pos Before Borr		6579	-3854	13677	8909	-12031	-18285	34	10692	8440	2954	36057	15202	10579
Money To Be Borrowed														
- Operating Loans		3000	0	0	0	11000	19000	0	0	0	0	0	0	0
- Int & L/T Loans		0	0	0	0	0	0	0	0	0	0	0	0	0
Op Loan Pay - Prin		3000	0	0	0	0	0	0	0	0	0	26000	0	4000
- Interest		1408	0	0	0	0	0	0	0	0	0	0	0	1408
Outflows To Savings		0	0	0	0	0	0	0	0	0	0	0	0	0
Ending Cash Balance		5171	-3854	13677	8909	-1031	715	34	10692	8440	2954	10057	15202	5171
Loan Balances:														
Curr Interest Rate	10.00													
Current Yr's Op Loan			0	0	0	11000	30000	30000	30000	30000	30000	4000	4000	0
- Accrued Interest		1408	0	0	0	92	250	250	250	250	250	33	33	0
Prev Yr's Oper Loans			0	0	0	0	0	0	0	0	0	0	0	0
- Accrued Interest			0	0	0	0	0	0	0	0	0	0	0	0
Int & Long Term Loan	152658		152466	152273	152079	151883	151685	151486	151285	151083	150879	150674	150468	126861
Total Loans			152466	152273	152079	162883	181685	181486	181285	181083	180879	154674	154468	126861
Consistency Check:														
Total Inflows			2238	16746	14415	29052	20957	4203	20210	15680	11178	43166	18270	71417
Total Outflows			2238	16746	14415	29052	20957	4203	20210	15680	11178	43166	18270	71417
Budgeting Error			0	0	0	0	0	0	0	0	0	0	0	0

1989
FAMILY LIVING BUDGET

Curtis R. Johnson — Date: 08/30/87

Profit Center: Not Defined

Description	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Total
Food	190	190	190	190	190	190	190	190	190	190	190	190	2,280
Household Oper. Exp	0	0	0	0	0	0	0	0	0	0	0	0	0
Household Equip/Furn	0	0	0	0	0	0	0	0	0	0	0	0	0
House Repairs	50	50	50	50	50	50	50	50	50	50	50	50	600
Rent	0	0	0	0	0	0	0	0	0	0	0	0	0
Clothing	60	60	60	60	60	60	60	60	60	60	60	60	720
Personal	100	100	100	100	100	100	100	100	100	100	100	100	1,200
Entertain/Recreation	75	75	75	75	75	75	75	75	75	75	75	75	900
Educ/Read. Materials	15	15	15	15	15	15	15	15	15	15	15	15	180
Medical Care & Drugs	75	75	75	75	75	75	75	75	75	75	75	75	900
Church And Charity	0	0	0	0	0	0	0	0	0	0	0	0	0
Personal Gifts	0	0	0	0	0	0	0	0	0	0	0	0	0
Utilities (Non-Farm)	240	240	240	240	240	240	240	240	240	240	240	240	2,880
Tran/Auto (Non-Farm)	50	50	50	50	50	50	50	50	50	50	50	50	600
Prsnl/Rec Vhcl Purch	0	0	0	0	0	0	0	0	0	0	0	0	0
Medical/Disabil Ins	210	210	210	210	210	210	210	210	210	210	210	210	2,520
Life Insurance	200	200	200	200	200	200	200	200	200	200	200	200	2,400

1989, cont.

Description	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Total
Dependent Support	0	0	0	0	0	0	0	0	0	0	0	0	0
Add. To Prsnl Invest	0	0	0	0	0	0	0	0	0	0	0	0	0
Add. To Retire Accts	0	0	0	0	0	0	0	0	0	0	0	0	0
Gross Family Living	1,265	1,265	1,265	1,265	1,265	1,265	1,265	1,265	1,265	1,265	1,265	1,265	15,180

CASH FLOW STATEMENT

Name: Curtis R. Johnson
Projected For 1990
Address: Rural Route 1 Box 22 — Belpre KS. 67519 — Phone: 316-995-3362 — Date: 08/30/87

Profit Center: Not Defined

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Beg. Cash Balance	0	1500	1500	-835	16552	11710	978	2566	1881	12456	10178	5305	3708	8766
Operating Receipts:														
Crops And Feed	0	96678	0	0	0	0	0	0	12819	0	0	0	7393	76466
Livestock & Poultry	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Products (Livestock)	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Custom Work	0	15250	0	0	0	0	2250	2750	4000	4250	2000	0	0	0
Government Payments	0	49243	0	19722	0	9238	0	0	2447	0	0	14777	0	3059
Hedging Account W/D	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Capital Receipts:														
Breeding Stock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Machinery & Equip.	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0

1990, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Non-Farm Income:														
Off-Farm Wages	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Interest & Dividends	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Oil & Gas Income	0	6120	510	510	510	510	510	510	510	510	510	510	510	510
Inflow From Escrow	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total Cash Available	0	168791	2010	19397	17062	21458	3738	5826	21657	17216	12688	20592	11611	88801

1990, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Operating Expenses:														
Labor Hired	0	1550	0	0	0	0	0	300	500	0	250	500	0	0
Repairs-Mach & Equip	0	8220	685	685	685	685	685	685	685	685	685	685	685	685
Repairs-Build/Improv	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Rents & Leases	0	21450	0	0	0	0	0	0	0	0	0	0	0	21450
Seed	0	8546	0	0	0	6723	682	0	0	0	1141	0	0	0
Fertilizer & Lime	0	21320	0	0	1218	6207	9694	0	2846	299	1056	0	0	0
Chemicals	0	7100	0	0	0	3205	0	0	0	3895	0	0	0	0
Custom Machine Hire	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Supplies	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Livestock Expense	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Gas, Fuel, Oil	0	11224	0	0	1290	0	5752	0	2091	0	2091	0	0	0
Storage/Custom Dry	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Taxes (Real Est, PP)	0	1600	0	0	0	0	0	800	0	0	0	0	0	800
Insurance (Prop, Liab)	0	600	0	0	0	0	600	0	0	0	0	0	0	0
Utilities (Elect/Gas)	0	900	75	75	75	75	75	75	75	75	75	75	75	75
Market/Transport Exp	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Auto (Farm Share)	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Crop Insurance	0	4460	0	0	0	0	0	0	920	0	0	3540	0	0
Prof & Acct.	0	900	25	25	25	25	625	25	25	25	25	25	25	25
Total Cash Oper Exps	0	87870	785	785	3293	16920	18113	1885	7142	4979	5323	4825	785	23035

1990, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Stock & Feed Purch:														
Feeder Livestock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Breeding Livestock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Feed Purchased	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Capital Expenditures														
Machinery & Equip	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Buildings & Improve.	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Other Expenditures:														
Hedging Acct Deposit	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Gross Family Liv W/D	0	15060	1255	1255	1255	1255	1255	1255	1255	1255	1255	1255	1255	1255
Non-Farm Bus/Invest	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Income Tax & Soc Sec	0	12500	0	0	0	12500	0	0	0	0	0	0	0	0
Payment To Trustee	0	8050	350	350	350	350	350	350	350	350	350	350	350	4200
Loan Payments - Prin	0	28731	186	187	188	190	191	193	194	195	197	198	200	26612
Loan Payments - Int	0	11724	269	268	266	265	263	262	260	259	258	256	255	8843
Total Cash Required	0	163935	2845	2845	5352	31480	20172	3945	9201	7038	7383	6884	2845	63945

1990, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Cash Avail - Cash Req		4856	-835	16552	11710	-10022	-16434	1881	12456	10178	5305	13708	8766	24856
Inflows From Savings		0	0	0	0	0	0	0	0	0	0	0	0	0
Cash Pos Before Borr		4856	-835	16552	11710	-10022	-16434	1881	12456	10178	5305	13708	8766	24856
Money To Be Borrowed														
- Operating Loans		30000	0	0	0	11000	19000	0	0	0	0	0	0	0
- Int & L/T Loans		0	0	0	0	0	0	0	0	0	0	0	0	0
Op Loan Pay - Prin		30000	0	0	0	0	0	0	0	0	0	10000	0	20000
- Interest		1676	0	0	0	0	0	0	0	0	0	0	0	1676
Outflows To Savings		0	0	0	0	0	0	0	0	0	0	0	0	0
Ending Cash Balance		3180	-835	16552	11710	978	2566	1881	12456	10178	5305	3708	8766	3180
Loan Balances:														
Curr Interest Rate	10.00													
Current Yr's Op Loan			0	0	0	11000	30000	30000	30000	30000	30000	20000	20000	0
- Accrued Interest		1676	0	0	0	92	250	250	250	250	250	167	167	0
Prev Yr's Oper Loans			0	0	0	0	0	0	0	0	0	0	0	0
- Accrued Interest			0	0	0	0	0	0	0	0	0	0	0	0
Int & Long Term Loan	126861		126675	126488	126300	126110	125919	125726	125532	125337	125140	124942	124742	98130
Total Loans			126675	126488	126300	137110	155919	155726	155532	155337	155140	144942	144742	98130
Consistency Check:														
Total Inflows			2010	19397	17062	32458	22738	5826	21657	17216	12688	20592	11611	88801
Total Outflows			2010	19397	17062	32458	22738	5826	21657	17216	12688	20592	11611	88801
Budgeting Error			0	0	0	0	0	0	0	0	0	0	0	0

1990
FAMILY LIVING BUDGET

Curtis R. Johnson

Date: 08/30/87

Profit Center: Not Defined

Description	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Total
Food	185	185	185	185	185	185	185	185	185	185	185	185	2,220
Household Oper. Exp	0	0	0	0	0	0	0	0	0	0	0	0	0
Household Equip/Furn	0	0	0	0	0	0	0	0	0	0	0	0	0
House Repairs	50	50	50	50	50	50	50	50	50	50	50	50	600
Rent	0	0	0	0	0	0	0	0	0	0	0	0	0
Clothing	65	65	65	65	65	65	65	65	65	65	65	65	780
Personal	100	100	100	100	100	100	100	100	100	100	100	100	1,200
Entertain/Recreation	75	75	75	75	75	75	75	75	75	75	75	75	900
Educ/Read. Materials	15	15	15	15	15	15	15	15	15	15	15	15	180
Medical Care & Drugs	75	75	75	75	75	75	75	75	75	75	75	75	900
Church And Charity	0	0	0	0	0	0	0	0	0	0	0	0	0
Personal Gifts	0	0	0	0	0	0	0	0	0	0	0	0	0
Utilities (Non-Farm)	230	230	230	230	230	230	230	230	230	230	230	230	2,760
Tran/Auto (Non-Farm)	50	50	50	50	50	50	50	50	50	50	50	50	600
Prsnl/Rec Vhcl Purch	0	0	0	0	0	0	0	0	0	0	0	0	0
Medical/Disabil Ins	210	210	210	210	210	210	210	210	210	210	210	210	2,520
Life Insurance	200	200	200	200	200	200	200	200	200	200	200	200	2,400

1990, cont.

Description	Jan.	Feb	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Total
Dependent Support	0	0	0	0	0	0	0	0	0	0	0	0	0
Add. To Prsnl Invest	0	0	0	0	0	0	0	0	0	0	0	0	0
Add. To Retire Accts	0	0	0	0	0	0	0	0	0	0	0	0	0
Gross Family Living	1,255	1,255	1,255	1,255	1,255	1,255	1,255	1,255	1,255	1,255	1,255	1,255	15,060

CASH FLOW STATEMENT

Name: Curtis R. Johnson — Projected For 1991

Address: Rural Route 1 Box 22 — Belpre KS. 67519 — Phone: 316-995-3362 — Date: 08/30/87

Profit Center: Not Defined

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Beg. Cash Balance	0	2463	2463	76	190	1016	-20	752	16	11082	8699	-78	36679	41930
Operating Receipts:														
Crops And Feed	0	94925	0	0	0	0	0	0	12590	0	0	74698	7637	0
Livestock & Poultry	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Products (Livestock)	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Custom Work	0	15250	0	0	0	0	2250	2750	4000	4250	2000	0	0	0
Government Payments	0	29494	0	0	0	9236	0	0	2446	0	0	14778	0	3034
Hedging Account W/D	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Capital Receipts:														
Breeding Stock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Machinery & Equip.	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0

1991, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Non-Farm Income:														
Off-Farm Wages	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Interest & Dividends	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Oil & Gas Income	0	18288	1524	1524	1524	1524	1524	1524	1524	1524	1524	1524	1524	1524
Inflow From Escrow	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total Cash Available	0	160420	3987	1600	1714	11776	3754	5026	20576	16856	12223	90922	45840	46488

1991, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Operating Expenses:														
Labor Hired	0	1550	0	0	0	0	0	300	500	0	250	500	0	0
Repairs-Mach & Equip	0	8280	690	690	690	690	690	690	690	690	690	690	690	690
Repairs-Build/Improv	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Rents & Leases	0	21450	0	0	0	0	0	0	0	0	0	0	0	21450
Seed	0	8710	0	0	0	6852	706	0	0	0	1152	0	0	0
Fertilizer & Lime	0	21540	0	0	1218	6327	9713	0	2914	299	1069	0	0	0
Chemicals	0	7155	0	0	0	3207	0	0	0	3948	0	0	0	0
Custom Machine Hire	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Supplies	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Livestock Expense	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Gas, Fuel, Oil	0	11633	0	0	1320	0	5973	0	2170	0	2170	0	0	0
Storage/Custom Dry	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Taxes (Real Est, PP)	0	1600	0	0	0	0	0	800	0	0	0	0	0	800
Insurance (Prop, Liab)	0	600	0	0	0	0	600	0	0	0	0	0	0	0
Utilities (Elect/Gas)	0	900	75	75	75	75	75	75	75	75	75	75	75	75
Market/Transport Exp	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Auto (Farm Share)	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Crop Insurance	0	3540	0	0	0	0	0	0	0	0	0	3540	0	0
Prof & Acct.	0	900	25	25	25	25	625	25	25	25	25	25	25	25
Total Cash Oper Exps	0	87858	790	790	3328	17176	18382	1890	6374	5037	5431	4830	790	23040

1991, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Stock & Feed Purch:														
Feeder Livestock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Breeding Livestock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Feed Purchased	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Capital Expenditures														
Machinery & Equip	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Buildings & Improve.	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Other Expenditures:														
Hedging Acct Deposit	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Gross Family Liv W/D	0	15660	1305	1305	1305	1305	1305	1305	1305	1305	1305	1305	1305	1305
Non-Farm Bus/Invest	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Income Tax & Soc Sec	0	12500	0	0	0	12500	0	0	0	0	0	0	0	0
Payment To Trustee	0	5429	459	459	459	459	459	459	459	459	459	459	459	2384
Loan Payments - Prin	0	27631	1306	1315	1325	1336	1346	42	0	0	0	0	0	18534
Loan Payments - Int	0	8146	51	41	31	21	11	1314	1356	1356	1356	1356	1356	794
Total Cash Required	0	157224	3911	3910	6448	32796	21502	5010	9494	8157	8551	7950	3910	45585

1991, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Cash Avail - Cash Req		3196	76	-2310	-4734	-21020	-17748	16	11082	8699	3672	82972	41930	903
Inflows From Savings		0	0	0	0	0	0	0	0	0	0	0	0	0
Cash Pos Before Borr		3196	76	-2310	-4734	-21020	-17748	16	11082	8699	3672	82972	41930	903
Money To Be Borrowed														
- Operating Loans		47750	0	2500	5750	21000	18500	0	0	0	0	0	0	0
- Int & L/T Loans		0	0	0	0	0	0	0	0	0	0	0	0	0
Op Loan Pay - Prin		47750	0	0	0	0	0	0	0	0	3750	44000	0	0
- Interest		2293	0	0	0	0	0	0	0	0	0	2293	0	0
Outflows To Savings		0	0	0	0	0	0	0	0	0	0	0	0	0
Ending Cash Balance		903	76	190	1016	-20	752	16	11082	8699	-78	36679	41930	903
Loan Balances:														
Curr Interest Rate	10.00													
Current Yr's Op Loan			0	2500	8250	29250	47750	47750	47750	47750	44000	0	0	0
- Accrued Interest		2293	0	21	69	244	398	398	398	398	367	0	0	0
Prev Yr's Oper Loans			0	0	0	0	0	0	0	0	0	0	0	0
- Accrued Interest			0	0	0	0	0	0	0	0	0	0	0	0
Int & Long Term Loan	98130		93099	91576	90053	88503	87007	85484	83961	82438	80915	79392	77869	66935
Total Loans			93099	94076	98303	117780	134757	133234	131711	130188	124915	79392	77869	66935
Consistency Check:														
Total Inflows			3987	4100	7464	32776	22254	5026	20576	16856	12223	90922	45840	46488
Total Outflows			3987	4100	7464	32776	22254	5026	20576	16856	12223	90922	45840	46488
Budgeting Error			0	0	0	0	0	0	0	0	0	0	0	0

1991
FAMILY LIVING BUDGET

Curtis R. Johnson — Date: 08/30/87

Profit Center: Not Defined

Description	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Total
Food	200	200	200	200	200	200	200	200	200	200	200	200	2,400
Household Oper. Exp	0	0	0	0	0	0	0	0	0	0	0	0	0
Household Equip/Furn	0	0	0	0	0	0	0	0	0	0	0	0	0
House Repairs	50	50	50	50	50	50	50	50	50	50	50	50	600
Rent	0	0	0	0	0	0	0	0	0	0	0	0	0
Clothing	65	65	65	65	65	65	65	65	65	65	65	65	780
Personal	100	100	100	100	100	100	100	100	100	100	100	100	1,200
Entertain/Recreation	75	75	75	75	75	75	75	75	75	75	75	75	900
Educ/Read. Materials	15	15	15	15	15	15	15	15	15	15	15	15	180
Medical Care & Drugs	75	75	75	75	75	75	75	75	75	75	75	75	900
Church And Charity	0	0	0	0	0	0	0	0	0	0	0	0	0
Personal Gifts	0	0	0	0	0	0	0	0	0	0	0	0	0
Utilities (Non-Farm)	250	250	250	250	250	250	250	250	250	250	250	250	3,000
Tran/Auto (Non-Farm)	50	50	50	50	50	50	50	50	50	50	50	50	600
Prsnl/Rec Vhcl Purch	0	0	0	0	0	0	0	0	0	0	0	0	0
Medical/Disabil Ins	225	225	225	225	225	225	225	225	225	225	225	225	2,700
Life Insurance	200	200	200	200	200	200	200	200	200	200	200	200	2,400

1991, cont.

Description	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Total
Dependent Support	0	0	0	0	0	0	0	0	0	0	0	0	0
Add. To Prsnl Invest	0	0	0	0	0	0	0	0	0	0	0	0	0
Add. To Retire Accts	0	0	0	0	0	0	0	0	0	0	0	0	0
Gross Family Living	1,305	1,305	1,305	1,305	1,305	1,305	1,305	1,305	1,305	1,305	1,305	1,305	15,660

CASH FLOW STATEMENT

Name: Curtis R. Johnson — Projected For 1992

Address: Rural Route 1 Box 22 — Belpre KS. 67519 — Phone: 316-995-3362 — Date: 08/30/87

Profit Center: Not Defined

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Beg. Cash Balance	0	1500	1500	-1041	15137	11712	2925	61	7421	15726	13897	14444	22386	99455
Operating Receipts:														
Crops And Feed	0	166961	0	0	0	0	0	0	12960	0	0	0	154001	0
Livestock & Poultry	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Products (Livestock)	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Custom Work	0	15250	0	0	0	0	2250	2750	4000	4250	2000	0	0	0
Government Payments	0	43303	0	18719	0	7672	0	0	606	0	0	13272	0	3034
Hedging Account W/D	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Capital Receipts:														
Breeding Stock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Machinery & Equip.	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0

1992, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Non-Farm Income:														
Off-Farm Wages	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Interest & Dividends	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Oil & Gas Income	0	11520	960	960	960	960	960	960	960	960	960	960	960	960
Inflow From Escrow	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Total Cash Available	0	238534	2460	18638	16097	20344	6135	3771	25947	20936	16857	28676	177347	103449

1992, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Operating Expenses:														
Labor Hired	0	1550	0	0	0	0	0	300	500	0	250	500	0	0
Repairs-Mach & Equip	0	9600	800	800	800	800	800	800	800	800	800	800	800	800
Repairs-Build/Improv	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Rents & Leases	0	21450	0	0	0	0	0	0	0	0	0	0	0	21450
Seed	0	14573	0	0	0	11399	1993	0	0	0	1181	0	0	0
Fertilizer & Lime	0	36569	0	0	1244	9488	18913	0	5041	581	1302	0	0	0
Chemicals	0	13490	0	0	0	6782	0	0	0	6708	0	0	0	0
Custom Machine Hire	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Supplies	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Livestock Expense	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Gas, Fuel, Oil	0	13028	0	0	1200	0	6968	0	2430	0	2430	0	0	0
Storage/Custom Dry	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Taxes (Real Est, PP)	0	1600	0	0	0	0	0	800	0	0	0	0	0	800
Insurance (Prop, Liab)	0	600	0	0	0	0	600	0	0	0	0	0	0	0
Utilities (Elect/Gas)	0	900	75	75	75	75	75	75	75	75	75	75	75	75
Market/Transport Exp	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Auto (Farm Share)	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Crop Insurance	0	3540	0	0	0	0	0	0	0	0	0	3540	0	0
Prof & Acct.	0	900	25	25	25	25	625	25	25	25	25	25	25	25
Total Cash Oper Exps	0	117800	900	900	3344	28569	29974	2000	8871	8189	6063	4940	900	23150

1992, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept	Oct.	Nov.	Dec.
Stock & Feed Purch:														
Feeder Livestock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Breeding Livestock	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Feed Purchased	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Capital Expenditures														
Machinery & Equip	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Buildings & Improve.	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Other Expenditures:														
Hedging Acct Deposit	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Gross Family Liv W/D	0	16200	1350	1350	1350	1350	1350	1350	1350	1350	1350	1350	1350	1350
Non-Farm Bus/Invest	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Income Tax & Soc Sec	0	12500	0	0	0	12500	0	0	0	0	0	0	0	0
Payment To Trustee	0	16006	397	397	15212	0	0	0	0	0	0	0	0	0
Loan Payments - Prin	0	72926	285	287	72354	0	0	0	0	0	0	0	0	0
Loan Payments - Int	0	1136	569	567	0	0	0	0	0	0	0	0	0	0
Total Cash Required	0	236568	3501	3501	92260	42419	313[illegible]	3350	10221	9539	7413	6290	2250	24500

1992, cont.

Description	Last Yr.	Total	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.
Cash Avail - Cash Req		1966	-1041	15137	-76163	-22075	-25189	421	15726	11397	9444	22386	175097	78949
Inflows From Savings		0	0	0	0	0	0	0	0	0	0	0	0	0
Cash Pos Before Borr		1966	-1041	15137	-76163	-22075	-25189	421	15726	11397	9444	22386	175097	78949
Money To Be Borrowed														
- Operating Loans		72000	0	0	7250	25000	25250	7000	0	2500	5000	0	0	0
- Int & L/T Loans		80625	0	0	80625	0	0	0	0	0	0	0	0	0
Op Loan Pay - Prin		72000	0	0	0	0	0	0	0	0	0	0	72000	0
- Interest		3642	0	0	0	0	0	0	0	0	0	0	3642	0
Outflows To Savings		0	0	0	0	0	0	0	0	0	0	0	0	0
Ending Cash Balance		78949	-1041	15137	11712	2925	61	7421	15726	13897	14444	22386	99455	78949
Loan Balances:														
Curr Interest Rate	10.00													
Current Yr's Op Loan			0	0	7250	32250	57500	64500	64500	67000	72000	72000	0	0
- Accrued Interest		3642	0	0	60	269	479	538	538	558	600	600	0	0
Prev Yr's Oper Loans			0	0	0	0	0	0	0	0	0	0	0	0
- Accrued Interest			0	0	0	0	0	0	0	0	0	0	0	0
Int & Long Term Loan	72926		72641	72354	80625	80625	80625	80625	80625	80625	80625	80625	80625	80625
Total Loans			72641	72354	87875	112875	138125	145125	145125	147625	152625	152625	80625	80625
Consistency Check:														
Total Inflows			2460	18638	103972	45344	31385	10771	25947	23436	21857	28676	177347	103449
Total Outflows			2460	18638	103972	45344	31385	10771	25947	23436	21857	28676	177347	103449
Budgeting Error			0	0	0	0	0	0	0	0	0	0	0	0

1992
FAMILY LIVING BUDGET

Curtis R. Johnson — Date: 08/30/87

Profit Center: Not Defined

Description	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Total
Food	200	200	200	200	200	200	200	200	200	200	200	200	2,400
Household Oper. Exp	0	0	0	0	0	0	0	0	0	0	0	0	0
Household Equip/Furn	0	0	0	0	0	0	0	0	0	0	0	0	0
House Repairs	50	50	50	50	50	50	50	50	50	50	50	50	600
Rent	0	0	0	0	0	0	0	0	0	0	0	0	0
Clothing	60	60	60	60	60	60	60	60	60	60	60	60	720
Personal	100	100	100	100	100	100	100	100	100	100	100	100	1,200
Entertain/Recreation	75	75	75	75	75	75	75	75	75	75	75	75	900
Educ/Read. Materials	15	15	15	15	15	15	15	15	15	15	15	15	180
Medical Care & Drugs	75	75	75	75	75	75	75	75	75	75	75	75	900
Church And Charity	0	0	0	0	0	0	0	0	0	0	0	0	0
Personal Gifts	0	0	0	0	0	0	0	0	0	0	0	0	0
Utilities (Non-Farm)	250	250	250	250	250	250	250	250	250	250	250	250	3,000
Tran/Auto (Non-Farm)	50	50	50	50	50	50	50	50	50	50	50	50	600
Prsnl/Rec Vhcl Purch	0	0	0	0	0	0	0	0	0	0	0	0	0
Medical/Disabil Ins	275	275	275	275	275	275	275	275	275	275	275	275	3,300
Life Insurance	200	200	200	200	200	200	200	200	200	200	200	200	2,400

1992, cont.

Description	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec.	Total
Dependent Support	0	0	0	0	0	0	0	0	0	0	0	0	0
Add. To Prsnl Invest	0	0	0	0	0	0	0	0	0	0	0	0	0
Add. To Retire Accts	0	0	0	0	0	0	0	0	0	0	0	0	0
Gross Family Living	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	1,350	16,200

No. 90-693

In The

Supreme Court of the United States

October Term, 1990

CURTIS REED JOHNSON,

Petitioner,

vs.

HOME STATE BANK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR THE PETITIONER

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A. QUESTION PRESENTED FOR REVIEW

Whether the terms "debt" and "claim" as defined at 11 U.S.C. §101(11) and 11 U.S.C. §101(4), respectively, encompass the *in rem* portion of a secured debt which remains due after the discharge in a prior bankruptcy of the *in personam* portion.

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No. 90-693

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BRIEF FOR THE PETITIONER

D. Opinions

The opinion of the court of appeals (Pet. pp. App. 1-App. 8) is reported at 904 F.2d 563 (10th Cir. 1990). The opinion of the district court (Pet. pp. App. 9-App. 19) is reported at 96 B.R. 326 (D.Kan. 1989). The opinion of the bankruptcy court (Pet. pp. App. 20-App. 33) is not reported.

E. Jurisdiction

The judgment of the court of appeals (Pet. pp. App. 34-App. 35) was entered on June 7, 1990. A petition for

rehearing suggestion for rehearing en banc was denied on August 1, 1990. (Pet. pp. App. 36-App. 37) The Petition for Writ of Certiorari was filed on October 26, 1990 and was granted on January 22, 1991. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

F. Statutes Involved

1. 11. U.S.C. §101(11): "debt" means liability on a claim.

2. 11 U.S.C. §101(4): "claim" means –

   (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

   (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

3. 11 U.S.C. §102(2): "Claim against the debtor" includes claim against property of the debtor.

G. Statement of the Case

Introduction

The Petitioner, Curtis Reed Johnson, (hereinafter "Johnson") and his wife operate a farm in Edwards

County, Kansas. In 1984, unable to pay the debt they had accumulated, they defaulted on their loan to the Respondent, the Home State Bank of Lewis, Kansas, (hereinafter "the Bank") and the Bank foreclosed. The Johnsons sought relief in bankruptcy and obtained a discharge of their *in personam* obligation to the Bank under the provisions of Chapter 7 of the United States Bankruptcy Code. After the Bank obtained relief from the automatic stay in the Chapter 7 bankruptcy proceeding, it proceeded in state court with its foreclosure action on the *in rem* liability which remained after the Chapter 7 discharge. After a sheriff's sale, the Johnsons appealed to the Kansas Supreme Court, which reversed and remanded the case to the state trial court with instructions to conduct another sheriff's sale. After the case was remanded, but before the second sale could be conducted, Johnson filed a Chapter 13 bankruptcy. The bankruptcy court confirmed Johnson's amended Chapter 13 plan, the district court reversed the bankruptcy court, and the Tenth Circuit Court of Appeals affirmed the district court. This Court granted Johnson's Petition for Writ of Certiorari on January 22, 1991.

The Case

On May 1, 1978, the Johnsons executed a first mortgage to the Travelers Insurance Company (hereinafter "Travelers") covering two quarter sections of land in Edwards County, Kansas. That mortgage was not foreclosed in the foreclosure proceedings instituted by the Bank.[1]

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[1] The portions of the proceeding which took place prior to the Chapter 13 filing which are not, therefore, contained in the

On June 2, 1978, the Johnsons executed a second mortgage to the Bank covering the same two quarter sections of land. The mortgage was given to secure a loan of $100,000.00 evidenced by a promissory note from the Johnsons to the Bank executed on the same date. The mortgage states that it is subject to the first mortgage to Travelers.

On February 25, 1983, the Johnsons entered into a loan agreement with the Bank. In conjunction therewith, the Johnsons executed two notes, one in the amount of $60,000.00 and the other in the amount of $310,000.00. The loans were secured by the second mortgage, security interests in farm machinery and equipment, crops, government payments, and assignments of oil and gas income.

On March 23, 1984, the Bank initiated its foreclosure action against the Johnsons in the Edwards County, Kansas District Court. At the time suit was filed, the $310,000.00 note had been reduced to approximately $260,000.00, and the $60,000.00 note had been reduced to approximately $13,000.00.

On September 7, 1984, the Johnsons executed a deed to their son and transferred ownership of one quarter section of land to him subject to the Travelers' and the Bank's mortgages. The deed was recorded on September 10, 1984.[2]

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record before the Court, have been taken from the facts found by the Kansas Supreme Court in its decision in *Home State Bank v. Johnson*, 240 Kan. 417, 418-424, 729 P.2d 1225, 1226-1230 (1986).

[2] The facts in this paragraph are not in the record or in the opinion of the Kansas Supreme Court, but are undisputed.

On October 9, 1984, the Johnsons filed a joint petition for relief under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Kansas. On April 11, 1985, the bankruptcy court discharged the Johnsons from all dischargeable debts. About the same time, the bankruptcy court entered an order granting the Bank relief from the automatic stay imposed by 11 U.S.C. §362 to proceed with foreclosure *in rem* without taking any personal judgment against the Johnsons.

On June 18, 1985, the Bank filed a motion for summary judgment in the Edwards County District Court. On October 9, 1985, the matter came before the Edwards County District Court for oral argument, at which time the court granted the Bank's motion. The court ordered the sheriff to sell the real property which was the subject of the Bank's mortgage subject to Travelers' unforeclosed first mortgage. On December 6, 1985, the sheriff filed his return on the order of sale reporting that the Bank was the highest and best bidder.

On January 7, 1986, the court took up the Bank's motion to confirm sheriff's sale and Johnsons' objection thereto. The Johnsons moved to set aside the sale claiming, among other arguments, that the Bank could only enforce the mortgage *in rem* for $100,000.00. The court overruled the Johnsons' objections and confirmed the sale.

The Johnsons perfected an appeal to the Kansas Court of Appeals, which transferred the case, upon the Johnsons' motion, to the Kansas Supreme Court. (Pet. p.

App. 22) On March 14, 1986, Travelers assigned its mortgage to the Bank.

On December 11, 1986, the Kansas Supreme Court reversed the trial court's decision which (1) foreclosed the second mortgage *in rem* without finding and stating the amount due, and (2) confirmed the sheriff's sale. The case was remanded to the trial court with directions to set aside the sheriff's sale and deed and for further proceedings in conformity with the court's opinion. *Home State Bank v. Johnson*, 240 Kan. 417, 430, 729 P.2d 1225, 1234 (1986).

On February 9, 1987, the case came before the trial court on remand. It granted the Bank judgment on its second mortgage *in rem* in the principal amount of $100,000.00 plus accrued interest. It also found that the amount remaining due on the unforeclosed first mortgage which the Bank purchased from Travelers was $100,447.42. It also granted the Bank an *in rem* judgment in the amount of $1,757.96 for taxes it paid. Lastly, the court ordered that the property be sold by the sheriff on April 13, 1987 at 10:00 a.m. (Pet. p. App. 23)

On February 24, 1987, Johnson's wife executed a quitclaim deed to her husband transferring all of her ownership interest in the real property at issue to Johnson. The deed was recorded on February 26, 1987. On February 24, 1987, Johnson's son and daughter-in-law executed a quitclaim deed to Johnson, transferring back to him all ownership they had in the quarter section of real property which had previously been transferred to Johnson's son. The deed was recorded on February 26, 1987. (Pet. p. App. 23-App. 24) At the time of the Chapter

13 filing, both quarter sections of land were owned solely by Johnson.

On March 2, 1987, Johnson filed his voluntary Chapter 13 Petition in the United States Bankruptcy Court for the District of Kansas. (R-BR 1) He scheduled the Bank as a partially secured creditor based on the journal entry filed in Edwards County District Court on remand from the Kansas Supreme Court. (R-BR 1, Chap. 13 Stmt., ques. 14a) The only other debt scheduled by Johnson was another *in rem* liability which remained due after the Johnsons' discharge in the Chapter 7 bankruptcy. (*Id.*) The Bank filed an objection to Johnson's plan on June 2, 1987. (R-BR 17)

On June 23, 1987, the bankruptcy court refused to confirm Johnson's first plan holding that it was "not confirmable for lack of feasibility under the present circumstances." (Tr., p. 108; R-BR 22) But the court allowed Johnson an opportunity to file an amended plan, which he did on July 6, 1987. (R-BR 24)

In Johnson's amended plan, he proposed to pay the Bank by tendering all monthly oil and gas royalty payments directly from the producers to the Bank. Additionally, Johnson proposed to make annual payments to the Bank on the first day of December of each year for five years beginning December 1, 1987 as follows:

1987:	$10,000.00
1988:	$32,000.00
1989:	$32,000.00
1990:	$35,000.00
1991:	$17,500.00

Lastly, Johnson proposed to pay the Bank a lump-sum payment on or before March 1, 1992 in satisfaction of the remaining amount of the Bank's claim, which Johnson projected to be $80,652.92. (R-BR 24 pp. 4-6)

On August 7, 1987, the Bank filed a detailed objection to Johnson's proposed amended plan wherein the Bank alleged, in part, that the bankruptcy court lacked personal and subject matter jurisdiction "by virtue of the Chapter 7 discharge granted [Johnson] on April 11, 1985, [in the prior Chapter 7 bankruptcy proceeding]," that the plan was not feasible, and that the plan was not submitted in good faith. (R-BR 31)

The case came before the bankruptcy court for evidentiary hearing on Johnson's amended plan on September 3, 1987. After hearing the evidence, the bankruptcy court took the case under advisement. (R-BR 34) On April 8, 1988, and bankruptcy court issued its decision confirming Johnson's amended plan. (R-BR 44; Pet. pp. App. 20-App. 33)

On April 18, 1988, the Bank filed its notice of appeal from the bankruptcy court's decision to the United States District Court for the District of Kansas. (R-BR 48)

On January 3, 1989, the district court entered its decision reversing the bankruptcy court. The district court held that Johnson's plan could not be confirmed because it improperly scheduled a debt previously discharged under Chapter 7. Having made that determination, the court specifically declined to rule on the issues of good faith and feasibility which were also raised by the Bank in the appeal. (R-DC 12; Pet. pp. App. 9-App. 19)

On February 2, 1989, Johnson filed a notice of appeal from the district court's decision to the United States Court of Appeals for the Tenth Circuit. On February 3, 1989, the Bank filed a notice of cross-appeal raising the issues of good faith and feasibility which were not ruled upon by the district court. (R-DC 14 and 15)

On February 27, 1989, the district court entered an order for stay pending appeal upon Johnson's motion. The district court ordered that the Bank was stayed from any further action against Johnson or his property in any district court of the State of Kansas and in the United States Bankruptcy Court for the District of Kansas pending resolution of the appeal to the Tenth Circuit Court of Appeals. The stay was subject to Johnson's payments to the bankruptcy trustee of adequate protection payments delineated by the court in amounts equal to the payments due under the plan of reorganization confirmed by the bankruptcy court. (R-DC 24)

Thereafter, when Johnson did not make the payments due under the previously confirmed plan, the Bank filed a motion to terminate or vacate stay pending appeal. (R-DC 25) Johnson objected to the Bank's motion stating that he was able to pay $17,000.00 in lieu of the plan payments previously ordered by the court. (R-DC 28 and 29) The court denied the Bank's motion to terminate or vacate stay pending appeal by order dated May 4, 1989. (R-DC 27)

On June 7, 1990, the court of appeals entered its decision affirming the district court. In making its decision, the court did not reach the issues of good faith and

feasibility raised by the Bank in its cross-appeal. (Pet. pp. App. 1-App. 8)

On June 21, 1990, Johnson filed a petition for rehearing and suggestion for rehearing en banc, which the court denied by order filed August 1, 1990. (R-10th Cir. 49, 54; Pet. pp. App. 34-App. 35) On August 9, 1990, the court of appeals issued its mandate. (R-10th Cir. 57)

On June 13, 1990, the Bank filed in the United States District Court a motion to disburse to the Bank the funds held by the bankruptcy trustee for the stay pending appeal. (R-DC 43) On October 1, 1990, the court overruled the Bank's motion and ordered that the remaining funds on hand with the bankruptcy trustee be used, in part, to satisfy Johnson's attorneys' fees approved by the bankruptcy court. The balance of the funds were to be held by counsel for Johnson in trust pending further order by the bankruptcy court. (R-DC 48)

On October 26, 1990, the Edwards County District Court issued an order of sale directing the sheriff to sell the real property at issue.[3] Also, on October 26, 1990, Johnson filed his Petition for Writ of Certiorari in this Court. (R-10th Cir. 62)

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[3] The facts described in this sentence are not in the record because they occurred in the foreclosure action pending in the state court after the Tenth Circuit's decision; but these facts are not disputed. They are set forth here to give the Court a full understanding of what has transpired in this case between the Tenth Circuit's decision and now, and because of the Bank's allegation that the case is moot. (Res. Supp. Brief pp. 2-3)

On November 21, 1990, Johnson filed an adversary complaint against the Bank in the bankruptcy court seeking an order enjoining the Bank from selling or attempting to sell the real property at issue pending a determination by this Court on the Petition for Writ of Certiorari. The adversary proceeding came before the bankruptcy court on November 21, 1990 on Johnson's motion for a temporary restraining order, at which time the court entered an oral order denying Johnson's motion.[4]

On November 23, 1990, Johnson filed in the Tenth Circuit Court of Appeals an emergency motion to stay the operation of its mandate pending final disposition of the Petition for Writ of Certiorari to this Court. (R-10th Cir. 60) On November 27, 1990, the court of appeals issued an order recalling its mandate and stayed issuance of the mandate pending final determination on the Petition for Writ of Certiorari. (R-10th Cir. 65) Due to the withdrawal of the mandate and the bankruptcy court's resulting loss of jurisdiction, a written order on the bankruptcy court's oral order denying Johnson's motion for a temporary restraining order in the aforedescribed adversary proceeding was not entered.[5]

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[4] The facts in this paragraph are not in the record because they occurred in the bankruptcy court after the entry of the Tenth Circuit's mandate but before the Petition for Writ of Certiorari was granted; but these facts are not disputed. They are included here because of the mootness issue raised by the Bank. (Res. Supp. Brief pp. 2-3)

[5] The facts in this sentence are not in the record because they occurred in the bankruptcy court after the entry of the Tenth Circuit's mandate but before the Petition for Writ of

The Edwards County, Kansas sheriff conducted a sale of the real property in issue on November 27, 1990 and reported that the Bank was the highest and best bidder. On the same date, the Bank filed its motion to confirm the sale, to which the Johnsons objected on December 14, 1990. The motion to confirm the sale and the Johnsons' objection thereto came before the Edwards County District Court on December 19, 1990 at which time the court confirmed the sale. An order to that extent was entered on January 2, 1991. On January 9, 1991, the Johnsons filed their notice of appeal from the decision of the Edwards County District Court to the Kansas Court of Appeals. The case in the Kansas Court of Appeals was docketed on January 22, 1991.[6]

On January 22, 1991, this Court granted Johnson's Petition for Writ of Certiorari.

During the pendency of the bankruptcies and the appeals, Johnson has remained in possession of the property and has received virtually all income from the farming operation. The only payments made by Johnson to the Bank pursuant to the plan confirmed by the bankruptcy court have been the initial $10,000.00 due on December 1,

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Certiorari was granted; but these facts are not disputed. They are included here because of the mootness issue raised by the Bank. (Res. Supp. Brief pp. 2-3)

[6] The facts described in this paragraph are not in the record because they occurred in the foreclosure action pending in the state court after the Tenth Circuit's decision; but these facts are not disputed. They are set forth here to give the Court a full understanding of what has transpired in this case between the Tenth Circuit's decision and now, and because of the Bank's allegation that the case is moot. (Res. Supp. Brief pp. 2-3)

1987 and the monthly oil and gas proceeds delivered by the producers to the Bank. Johnson did not attempt to negotiate a reaffirmation of the Bank's indebtedness discharged in the Chapter 7 bankruptcy. Johnson would not have been eligible to file a Chapter 13 bankruptcy but for the discharge of his unsecured debts in the prior Chapter 7 bankruptcy.[7]

H. Summary of Argument

The decision of the court below must be reversed because (1) the clear language of the Bankruptcy Code is contrary to the court's decision and (2) the court's decision does not logically compare with similarly situated parties who would clearly be entitled to bankruptcy relief.

The term "claim," defined at §101(4), was broadly defined by Congress. The lower court's narrow construction of the "right to payment" element in the definition of "claim" is not consistent with other provisions in the Bankruptcy Code which recognize that a "payment" can be made by transferring property owned by a debtor to a creditor. The lower court's requirement that the payment be made *from the debtor* adds an additional element to the definition of "claim" which Congress did not contemplate. Further, the lower court's restricted interpretation of the term "payment" ignores the term's common and ordinary meaning. Lastly, the lower court's decision whitewashes the clear language of §102(2) and stands on the legislative history (which has been used by courts to

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[7] These facts are not in the record, but are not disputed.

support decisions reaching the opposite conclusion), shunning the Congressional intent embodied in the clear statutory language.

The legal rights the Bank has against Johnson (to seize and sell his farm land) are no different than those rights many other lenders have against debtors where the lender may only satisfy its debt from the sale of its collateral. Yet, it is inconceivable that debtors in those situations should be precluded from bankruptcy relief, if necessary. While many courts have held that lenders in the same situation as the Bank have no "claim" against a debtor who has discharged his/her *in personam* debt in a prior Chapter 7 bankruptcy, these courts have not clearly reviewed the definition of "claim," the rule of construction in §102(2), and their use throughout the Bankruptcy Code. Such decisions confuse the question of whether a "claim" exists with the issue of good faith found at §1325(a)(3). Since there is no logical distinction between the rights the Bank has against Johnson and the rights other lenders have against debtors where the only source of "payment" is from liquidation of collateral, there is no logical basis for a determination that the Bank has no "claim" against Johnson.

I. Argument

In 1978, Congress enacted the Bankruptcy Code (sometimes hereinafter "the Code"), repealing the Bankruptcy Act of 1898.[8] In so doing, Congress for the first

[8] *See* Pub.L. 95-598, 92 Stat. 2549 (codified at Title 11, United States Code (1978)).

time defined the term "claim" for the purpose of the entire Bankruptcy Code.[9] The term "claim" was broadly defined in the Bankruptcy Code and contemplated "all legal obligations of the debtor."[10] Congress also intended, and it is now well settled, that discharges granted under the Code were to relieve the debtor of all personal liability, but allow *in rem* liabilities on a debtor's property to survive the bankruptcy discharge.[11] Also of significance is that Congress specifically proscribed serial bankruptcy filings under certain circumstances, but did not specifically prohibit the filing of a Chapter 13 bankruptcy immediately following a Chapter 7 bankruptcy.[12] In the case at

[9] Under the Bankruptcy Act of 1898, the term "claim" was either not defined or was defined differently for different Chapters within the Act. *See* 2 *Collier on Bankruptcy*, 15th Ed., §101.04 (1990); §§1, 406(2) and 606(1) of the Bankruptcy Act of 1898.

[10] H.R. Rep. No. 595, 95th Cong., 2d Sess. 309 (1978), *U.S. Code Cong. & Admin. News* 1978, p. 6266.

[11] H.R. Rep. No. 595, 95th Cong., 2d Sess. 361 (1978); S. Rep. No. 989, 95th Cong., 2d Sess. 76 (1978); *U.S. Code Cong. & Admin. News* 1978, pp. 5787, 5862, 6317; *Lindsey v. Fed. Land Bank of St. Louis*, 823 F.2d 189, 191 (7th Cir. 1987); and *Chandler Bank of Lyons v. Ray*, 804 F.2d 577 (10th Cir. 1986). *See also*, analysis pertaining to amendment to §524(a)(2) by Bankruptcy Amendments and Federal Judgeship Act of 1984 Pub.L 98-353, 98 Stat. 333 (1984) at *Grundy National Bank v. Johnson*, 106 B.R. 95, 97 (W.D. Va. 1989).

[12] *See* §109(g), §727(a)(8) and §1141(d)(3). This is of particular significance since Congress is presumed to be aware of existing law when it enacts a new law which incorporates sections of a prior law. *Lorillard v. Pons*, 434 U.S. 575, 580, 98 S.Ct. 866, 870, 55 L.Ed.2d 40, 45-46 (1978) This Court specifically allowed a Chapter XIII debtor to file an "extension plan" having obtained a discharge in a straight bankruptcy within six years of the Chapter XIII filing, in *Perry v. Commerce Loan Company*, 383 U.S.

bar, the Court must determine whether Congress intended to define "claim" so broadly as to include the *in rem* liability which remains after a Chapter 7 discharge. It is apparent that Congress had that intent.

1. THE TERM "CLAIM" SHOULD INCLUDE AN *IN REM* RIGHT AGAINST A DEBTOR'S PROPERTY BECAUSE (a) THE CREDITOR HAS A "RIGHT TO PAYMENT" AND (b) CONGRESS INTENDED TO DEFINE "CLAIM" BROADLY.

This case presents for decision a question of statutory construction. In reaching a decision, the Court must construe the definitions of "debt"[13] and "claim."[14] This Court has recently held that because "claim" is used in defining "debt," the meanings of these terms are "coextensive." *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. ___, 110 S.Ct. 2126, 2130, 109 L.Ed.2d 588, 595 (1990).

392, 86 S.Ct. 852, 15 L.Ed.2d 827 (1966); reh'g. denied 384 U.S. 934, 86 S.Ct. 1441, 16 L.Ed.2d 535 (1966).

[13] The term "debt" is defined in the Bankruptcy Code at 11 U.S.C. §101(11) as follows: "debt" means liability on a claim.

[14] The term "claim" is defined in the Bankruptcy Code at 11 U.S.C. §101(4) as follows: "claim" means –

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

Thus, Johnson concentrates on the definition of the term "claim" and its use throughout the Bankruptcy Code. In analyzing the term "claim," two fundamental rules of statutory construction should be observed. First, statutory construction begins with the language of the statute. *Landreth Timber Company v. Landreth*, 471 U.S. 681, 685, 105 S.Ct. 2297, 2301, 85 L.Ed.2d 692, 697 (1985). Second, statutory construction is not to be conducted by isolating the particular statutory phrase at issue – it is a "holistic endeavor." *United Savings Ass'n. v. Timbers of Inwood Forest*, 484 U.S. 365, 371, 108 S.Ct. 626, 630, 98 L.Ed.2d 740, 748 (1988). Utilizing these two standards of construction, it is evident that the term "claim" includes the Bank's *in rem* liability which encumbers Johnson's property.

(a) The Bank Has A "Right To Payment."

In the decision below, the court determined that the Bank has no "right to payment" *from Johnson* and therefore the Bank has no "claim."[15] The decision is incorrect for a number of reasons.

First, the court expanded the language of §101(4) by adding that the "right to payment" required by the statute must be *from the debtor.* The statutory language does not dictate that the payment required necessarily be money flowing from the debtor; it simply requires that

[15] *See* Pet. p. App. 7; 904 F.2d at 566. The court conceded that the Bank has a right to an equitable remedy "in the form of a state court foreclosure proceeding," but found no right to payment as necessary to satisfy the elements in either subsection (A) or (B) of §101(4).

there be a right to a payment.[16] The payment could be made by transferring the debtor's property to a creditor, a concept specifically recognized throughout the Bankruptcy Code.

In §1325(a)(5)(C), a debtor may confirm a Chapter 13 Plan by satisfying a secured claim through the transfer of the property which the creditor has as collateral. Section 363(k) allows a secured claimant to bid in and offset the amount of its claim (both the secured amount and the unsecured amount) at the sale of its collateral without paying any additional money. Thus, if such a creditor were the successful bidder, its claim would be satisfied or "paid" by receipt of the property.

Section 508 recognizes that a "transfer of property on account of a claim" in a foreign proceeding should be accounted for in a bankruptcy proceeding on the same claim – expressly recognizing that a transfer of property constitutes a payment. Section 502(d) disallows a claim to the extent the claimant is in possession of property which is recoverable by the bankruptcy estate under one of the avoidance provisions – essentially offsetting the estate's claim against the creditor's claim. Accordingly, the Bankruptcy Code recognizes in a number of places that a payment can be made by transferring property. The term "payment" does not require that money must be paid by the debtor.

Additionally, the lower court's decision that the Bank has no "right to payment" ignores the common meaning

[16] *See In Re Ligon*, 97 B.R. 398, 403 (Bankr. N.D. Ill. 1989) for a proper analysis of the "right to payment" requirement.

of the term "payment."[17] The term "payment" is defined in *Black's Law Dictionary* 1016 (5th Ed. 1979) as follows:

> Payment is a delivery of money or its *equivalent in either specific property* or services by one person from whom it is due to another person to whom it is due. [Citation omitted] A discharge in money *or its equivalent* of an obligation or debt owing by one person to another, and is made by debtor's delivery to creditor of money *or some other valuable thing*, and creditor's receipt thereof, for purpose of extinguishing debt. [Citation omitted] (Emphasis added).

It cannot seriously be argued that the Bank's mortgage rights were not intended by the parties to be a form of payment. The entire concept of security for a loan is providing an alternative means of payment if the debtor is either unwilling or unable to otherwise pay the debt. Certainly, the Bank has the right to receive the land it has mortgaged from Johnson and the Bank has, from the inception of the case, been receiving the oil and gas proceeds from Johnson's land in "payment" of a portion of Johnson's debt.

In addition, the court below ignored the method by which property is sold by execution in Kansas, as well as Johnson's redemption rights after the property is sold. The Bank also has a right to payment arising from those events. Under Kansas law, when a mortgagee forecloses on mortgaged property, the property is sold at a sheriff's

[17] "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199, 204 (1979).

sale. At the sheriff's sale, a bidding process is utilized. Under this procedure, the Bank could be paid the full amount of its judgment by a person or entity making a higher bid at the sale.[18] Thus, under Kansas law, it is possible that the Bank could be paid by a higher bidder at the sheriff's sale. As such, it has a right to payment.

Additionally, under Kansas law, a mortgagor is given a period of six months to a year to redeem real property sold at a sheriff's sale.[19] That procedure allows a debtor to redeem foreclosed property by paying the successful bidder at the sheriff's sale the amount bid, plus interest, costs and taxes. Thus, under Kansas law, even after the property is sold at a foreclosure sale, the Bank still has a right to payment if the debtor redeems the foreclosed property.[20]

Lastly, in making its decision, the court below did not consider the tax treatment of the sheriff's sale of Johnson's property as it bears on the issue of payment. When Johnson's property was sold at the sheriff's sale, the treasury regulations, as applied by the Internal Revenue Service, require that Johnson treat the transaction as a taxable sale for which a gain is recognized in an amount

[18] *See* K.S.A. 60-2410; and *Home State Bank v. Johnson*, 240 Kan. 417, 425, 729 P.2d 1225, 1231 (1986).

[19] *See* K.S.A. 60-2414.

[20] This is one of the issues now on appeal in the Kansas Court of Appeals where the Johnsons argue, in part, that the Bank improperly bid at the sheriff's sale thereby improperly increasing the amount the Johnsons must pay to redeem their land.

equal to the excess of the fair market value over Johnson's basis in the property. Debt forgiveness income would also be recognized to the extent the amount bid exceeds the property's fair market value.[21] On the other side of the transaction, the Bank receives a "payment" in an amount equal to the fair market value of the property, and is entitled to a bad debt deduction to the extent its bid exceeds the property's fair market value.[22] Accordingly, the Internal Revenue Service recognizes that a "payment" has been made.

For all of the above reasons, it is apparent that the Bank has a right to payment as required by §101(4) and that the lower court's decision to the contrary should be reversed.

(b) The Use Of The Term "Claim" Throughout The Bankruptcy Code And Other Provisions In The Bankruptcy Code Demonstrate Congress' Intent To Define "Claim" Broadly Enough To Encompass *In Rem* Liabilities.

When Congress enacted the Bankruptcy Code, it defined certain terms to be used throughout the Code. One of those terms is "claim." Congress' decision to provide a pervasive definition of "claim" to be used in all Chapters of Title 11 was a departure from the scheme existing under the 1898 Act.[23] Therefore, one must

[21] Treas. Regs. §1.1001-2(c), Ex. 8.

[22] Treas. Regs. §1.166-6(b).

[23] "Congress fundamentally restructured bankruptcy law by passing the new Bankruptcy Code." *Begier v. IRS*, 495 U.S.

assume that the use of the term throughout the Bankruptcy Code was part of a design by Congress to create uniformity with regard to what would constitute a valid "claim" in bankruptcy – no matter how the claim arose or the Chapter in which the action may be pending. From a review of some of the basic provisions in the Bankruptcy Code, it is evident that Congress intended that an *in rem* liability against a debtor's property be a "claim" in bankruptcy.

Section 502(b)(1) provides that claims in a bankruptcy proceeding will be allowed unless the "claim is unenforceable against the debtor *and property of the debtor*" under an agreement or the law. (Emphasis added) Thus, a claim is allowable if it is enforceable against the debtor or his property.

The automatic stay provisions of §362, one of the mainstays of bankruptcy relief, also support the notion that an *in rem* liability against a debtor's property constitutes a "claim" for bankruptcy purposes. Under subsections (a)(2) and (3), all entities are stayed from the enforcement of a judgment obtained before bankruptcy and from any act to obtain possession of or control over property of the estate. Property of the estate is broadly defined at §541(a)(1) as "all legal or equitable interests of the debtor in property" as of the bankruptcy filing. Therefore, unless liabilities imposed on a debtor's property are "claims" for bankruptcy purposes, the above provisions would be superfluous.

___, 110 S.Ct. 2258, 2265, 110 L.Ed. 46, 59 (1990); *United States v. Ron Pair Enterprises*, 489 U.S. ___, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290, 297 (1989). *See also*, n. 11, p. 15, *supra*.

As this Court has recognized,[24] the legislative history of §104 indicates that Congress intended the term "claim" to be construed broadly. Congress enacted "the broadest possible definition . . . contemplat[ing] that all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case. It permits the broadest possible relief in the bankruptcy court." *See* H.R. Rep. No. 595, 95th Cong., 2d Sess. 309 (1978); S. Rep. No. 989, 95th Cong., 2d Sess. 22 (1978); *U.S. Code Cong. & Admin. News* 1978, pp. 5787, 5808, 6266. Nothing in the Bankruptcy Code indicates that Congress intended to limit that "broad relief" by prohibiting an *in rem* liability encumbering a debtor's property after a Chapter 7 discharge from being included in the definition of "claim."

2. SECTION 102(2) EXPRESSLY ALLOWS AN *IN REM* LIABILITY AS A CLAIM.

The clear language of §102(2), which provides that a " 'claim against the debtor' includes [a] claim against property of the debtor," seems to dispose of the issue here presented. The court below, however, turned to the

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[24] *See Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. ___, 110 S.Ct. 2126, 2130, 109 L.Ed.2d 588, 595-596 (1990); *Ohio v. Kovacs*, 469 U.S. 274, 105 S.Ct. 705, 83 L.Ed.2d 649 (1985). Johnson recognizes that Congress recently acted to limit the *Pennsylvania Dept. of Pub. Welfare* decision. *See* Criminal Victims Protection Act of 1990, Pub.L. 101-581, 104 Stat. 2865 (1990). However, it is significant to note that Congress did not act by limiting the definition of "claim" at §101(4), but simply provided that criminal restitution obligations cannot be discharged in Chapter 13 proceedings.

"statute's illuminating legislative history"[25] to determine that Congress did not mean what it said.[26]

In so doing, the court relies heavily on the language in the Senate Report which states that §102(2) is intended to cover nonrecourse loan agreements.[27] While Congress did not specify in either the Senate Report or the House Report what was meant by the phrase "nonrecourse loan agreements," it is generally understood to mean a transaction where the borrower is not personally liable for repayment of the debt and the lender may only look to its collateral for payment.[28] This is precisely the situation the

[25] *See* Pet. p. App. 6; 904 F.2d at p. 566.

[26] The court apparently disregarded another age-old canon of statutory construction: the consideration of the legislative history of a statute is unnecessary where the language of the statute is clear and unambiguous. *United States v. Ron Pair Enterprises,* 489 U.S. ___, 109 S.Ct. 1026, 1030, 103 L.Ed.2d 290, 298 (1989); *Rubin v. United States,* 449 U.S. 424, 430, 101 S.Ct. 698, 701-702, 66 L.Ed.2d 633, 638 (1981). As pointed out by Johnson in his petition (p. 8), the legislative history relied on by the lower court is as illuminating for other courts, but for the opposite conclusion. In *In Re Saylors,* 869 F.2d 1434, 1436 (11th Cir. 1989), the court quotes with approval a portion of the decision in *Matter of Lagasse,* 66 B.R. 41, 43 (Bankr. D. Conn. 1986), which reviews the same language quoted in the opinion below (with the exception that in *Lagasse* the court uses the House Report and in *Johnson* the court uses the Senate Report) to reach the opposite conclusion.

[27] *See* Pet. p. App. 5; 904 F.2d at pp. 565-566.

[28] *See Commissioner of Internal Revenue v. Tufts,* 461 U.S. 300, 302, 103 S.Ct. 1826, 1828, 75 L.Ed.2d 863, 867 (1983); *Raphan v. United States,* 759 F.2d 879, 885 (D.C. Cir. 1985); *In Re Dan Hixson Chevrolet Co.,* 20 B.R. 108, 111 (Bankr. N.D. Tex. 1982); and Blackburn, *"Important Common Law Developments for Nonrecourse Notes: Tufting It Out,"* 18 *Ga. Law Rev.* 1, n. 2 (1983).

Bank faces here. Since Johnson has discharged his personal liability, the Bank's only recourse is against its collateral.[29]

The court below emphasized that there was no "agreement" between the parties for a nonrecourse loan.[30] However, the parties' agreement unquestionably contemplated payment from the collateral if the Johnsons either could not or would not otherwise pay the debt. Thus the lower court's distinction is one without a significant difference; in either situation, the lender is left to collect its debt from its collateral.

Lastly, an examination of how the rule of construction at §102(2) is used throughout the Bankruptcy Code illustrates Congress' intent to include *in rem* debts within the definition of "claim." Utilizing the phrase "claim against property of the debtor" instead of the phrase "claim against the debtor," as provided by §102(2), the following Code sections could be read as follows:

Section 362(a)(1)

> [A] petition filed under . . . this title . . . operates as a stay, applicable to all entities, of –

[29] Indeed, several courts, including the bankruptcy court in the case at bar, have held that a debtor's discharge of a secured debt converts the debt relationship from a recourse loan to a nonrecourse loan. *See,* Pet. p. App. 28; *In Re Saylors,* 869 F.2d 1434, 1436 (11th Cir. 1989); *Grundy National Bank v. Johnson,* 106 B.R. 95, 98 (W.D. Va. 1989); *In Re Klapp,* 80 B.R. 540, 542 (Bankr. W.D. Okla. 1987); *Matter of Lagasse,* 66 B.R. 41, 43 (Bankr. D. Conn. 1986).

[30] *See* Pet. p. App. 6; 904 F.2d at 566.

> (1) the commencement or continuation . . . of a judicial, administrative, or other action or proceeding . . . to recover a [claim against property of the debtor] that arose before the commencement of the [bankruptcy].

Section 362(a)(6)

[A] petition filed under . . . this title . . . operates as a stay, applicable to all entities, of –

> (6) any act to collect, assess, or recover a [claim against property of the debtor] that arose before the [bankruptcy].

Section 362(a)(7)

[A] petition filed under . . . this title . . . operates as a stay, applicable to all entities, of –

> (7) the setoff of any debt owing to the debtor . . . against any [claim against property of the debtor.]

Section 1322(a)(8)

The plan shall –

> (8) provide for the payment of all or part of a [claim against property of the debtor] from property of the estate or property of the debtor.

If any of the above provisions in the Bankruptcy Code are to have any substance, a "claim" must include *in rem* rights against a debtor's property.

3. LOGIC AND REASON REQUIRE THAT *IN REM* LIABILITIES BE INCLUDED IN THE DEFINITION OF "CLAIM."

While a review of the statutory language, the application of rules of construction, and an understanding of the legislative history of the statutory provisions in question are necessary to a determination of this case, it is equally necessary that the Court's decision be logical and based on sound principles of common sense. The position urged by Johnson satisfies these necessities.

(a) Other Lending Arrangements Which Result Only In *In Rem* Liabilities Should Be "Claims" For Purposes Of Bankruptcy Relief.

The legal rights the Bank has against Johnson are no different than the legal rights a lender has against a parent who has pledged property (with no *in personam* liability) as security for a child's debt. In both cases, the lender simply has rights against property. Yet, it would be inconceivable that a parent in that situation should be precluded from bankruptcy relief by a narrow interpretation of the definition of "claim."

Similarly, in those states that have antideficiency statutes[31] which prevent a creditor from obtaining a deficiency judgment so that the creditor may only pursue its collateral for payment of its debt, such a creditor stands in the same shoes as the Bank in the case at bar. But no reasonable person could suggest that the borrower in such a situation should be precluded from bankruptcy relief, if necessary, simply because the creditor may only pursue the debtor's property. And, of course, in those situations where nonrecourse loan agreements are

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[31] E.g., §5-103, Uniform Consumer Credit Code.

entered into in the first instance, Congress has specifically stated that such arrangements constitute "claims" within the meaning of the Bankruptcy Code.

There is no logical basis to explain the disparity of treatment between each of the examples set forth above and the situation at bar – the rights between the lender and the borrower are the same. The fact that the cited examples occur before a bankruptcy filing and the situation *sub judice* occurs as a result of a bankruptcy filing, does not change the essential relationship between the parties and should have no bearing on the question of whether a "claim" exists.

While not many courts have stated as much, it is likely that most courts which have held for the lender on the issue presented here have done so because they are offended by the serial bankruptcy filings and the perceived abuse of the bankruptcy process. These courts have confused the issue of whether a "claim" exists with the requirement that Chapter 13 plans be proposed in good faith.[32] This Court should correct that confusion. All indications from the language contained in the bankruptcy code are that the Bank has a "claim" against Johnson. Abuses of the bankruptcy process can be checked by application of the good faith standard.[33]

[32] *See Matter of Metz*, 820 F.2d 1495 (9th Cir. 1987) and *Matter of Hagberg*, 92 B.R. 809 (Bankr. W.D. Wis. 1988) for examples of cases which have correctly examined the "claim" issue, but reached opposite conclusions on confimation based on the good faith analysis required by §1325(a)(3).

[33] It should be noted that after Johnson filed his Chapter 7 bankruptcy, Congress recognized the need for special legislation in bankruptcy for farmers and enacted Chapter 12. *See*

Lastly, the court below, the district court, and several other courts,[34] have held that if the relief sought by Johnson were permitted, it would amount to forcing an involuntary, unilateral reaffirmation agreement on the Bank. Such a holding misconstrues the effect of a reaffirmation agreement. A reaffirmation agreement entered into pursuant to §524(c) has the effect of establishing the parties' rights as if a bankruptcy had not been filed. Thus, in Johnson's case, it would have reestablished the *in personam* liability Johnson owed to the Bank in an amount equal to the amount that was owed prior to the Chapter 7 bankruptcy. While a reaffirmation agreement cannot be made unilaterally by the creditor or the debtor, the effect of Johnson's Chapter 13 bankruptcy is not to reinstate the parties to their prebankruptcy relationship, rather, it is to allow Johnson to pay the Bank the value of its security (without regard to the total amount owed prior to bankruptcy), with interest, over a period of five years. Under the Bankruptcy Code, a debtor is specifically allowed to force a creditor to accept such treatment.[35]

Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub.L. 99-554, 100 Stat. 3088 (1986). Since at the time Johnson filed his Chapter 7 bankruptcy he was not eligible for Chapter 13 relief and relief under Chapter 11 would likely have been futile due to the absolute priority rule (*see* 11 U.S.C. §1129(b)(2)) and the 1111(b) election, both of which were eliminated in Chapter 12 proceedings, there is a justification for Johnson's subsequent Chapter 13 filing.

[34] *See* Pet. pp. App. 6 and App. 19; *In Re Russo*, 94 B.R. 127, 129 (Bankr. N.D. Ill. 1988); *In Re McKinstry*, 56 B.R. 191, 193 (Bankr. D. Vt. 1986); *In Re Binford*, 53 B.R. 307, 309 (Bankr. W.D. Ky. 1985); and *In Re Brown*, 52 B.R. 6, 7 (Bankr. S.D. Ohio 1985).

[35] *See* §1325(a)(5)(B), §1225(a)(5)(B) and §1129(b)(2)(A).

J. Conclusion

For all of the above reasons, Johnson respectfully requests that the Court reverse the decision of the court below and remand the case to the district court for further proceedings on the undecided issues raised by the Bank in its appeal from the bankruptcy court.

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In The

Supreme Court of the United States

October Term, 1990

CURTIS REED JOHNSON,

Petitioner,

vs.

HOME STATE BANK,

Respondent.

On Writ Of Certiorari To
The United States Court Of
Appeals For The Tenth Circuit

BRIEF OF RESPONDENT

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A. QUESTION PRESENTED FOR REVIEW

1. Whether a debtor, after receiving a discharge in Chapter 7 of a mortgage obligation secured by a promissory note, can file a subsequent Chapter 13 and schedule for payment the remaining *in rem* remedy in an effort to retain the property.

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C. TABLE OF AUTHORITIES – Continued

STATUTES

C. TABLE OF AUTHORITIES – Continued

C. TABLE OF AUTHORITIES – Continued

Other

No. 90-693

In The

Supreme Court of the United States

October Term, 1990

CURTIS REED JOHNSON,

Petitioner,

vs.

HOME STATE BANK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF THE RESPONDENT

D. STATUTES INVOLVED

In addition to those statutes outlined in petitioner's brief, this case involves the following definition: 11 U.S.C. §101(9): "Creditor" means –

> (A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor; . . .

E. STATEMENT OF THE CASE

The respondent (hereinafter "Bank") adopts the Statement of Facts filed by the petitioner (hereinafter "Johnson" or "debtor"), with the exception of the following additions and modifications.

On pages 3 and 4 of Johnson's brief, it is stated that the Johnsons executed mortgages to Travelers Insurance Company (hereinafter "Travelers") and the Bank on May 1, 1978, and June 2, 1978, respectively. However, the Johnsons actually executed promissory notes secured by mortgages to Travelers and the Bank on those dates. (Pet. Cert. App. 10)[1]

The Johnsons subsequently defaulted on their notes with the Bank, and on March 23, 1984, the Bank filed a foreclosure action against the Johnsons in the District Court of Edwards County, Kansas. *Id.*

Both the first mortgage held by Travelers and the second mortgage held by the Bank contain clauses whereby, in the event of a default, any royalty income received by the Johnsons from oil and gas leases on the property would be assigned to the mortgagees. *Id.*

In 1986, the Bank purchased the first mortgage of Travelers and, thus, became the owner of both mortgages. (Pet. Cert. App. 11). The first mortgage formerly owned by Travelers has never been foreclosed. Any oil and gas royalties received by the Bank have been pursuant to the unforeclosed first mortgage assignment.

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[1] A thorough discussion of the facts in this case is set forth in the United States District Court opinion. *In Re Johnson*, 96 B.R. 326 (D. Kan. 1989); Pet. Cert. App. 9-19.

On February 27, 1989, Johnson's motion for stay pending appeal was sustained. As a condition of the stay his proposed plan payments were to be paid to the trustee. (R-DC 24).

On May 4, 1989, the district court denied the Bank's motion to terminate or vacate the stay pending appeal. (R-DC 27). The Bank's motion was based upon the debtor's failure to make his second annual payment in the amount of $35,520.00 to stay the appeal. In denying the Bank's motion, the district court allowed Johnson to substitute a payment in the amount of $17,000.00 to be held by the trustee. *Id.* At no time did the Bank receive the $17,000.00 payment held by the trustee.

Johnson made no other plan payments to the trustee as required by the February 27, 1989, stay pending appeal. (R-DC 24, 37, 38, 43).

On December 22, 1989, the bankruptcy court issued an order approving Johnson's attorney's fees to be paid out of the $17,000.00 held by the trustee. (R-BC 86). On February 12, 1990, the district court also entered an order approving Johnson's attorney's fees to be paid from the $17,000.00. (R-DC 36).

On October 1, 1990, the district court disbursed the balance of funds held by the trustee to Johnson's counsel. (R-DC 48).

Johnson's five-year plan also proposes to make monthly payments to the trustee in the amount of $291.42 for Mid-Kansas Federal Savings & Loan (hereinafter "Mid-Kansas"), with a balloon payment of $7,222.77 for that institution. (JA 16-17).

Johnson's amended plan provides no payment to unsecured creditors and provides no cure to any arrearages. Johnson is delinquent in his payments under the plan in the amount of $109,890.00 as of December 1, 1990. (JA 14-25; Pet. Brief, p. 12).

F. SUMMARY OF THE ARGUMENT

The Tenth Circuit correctly held that a debtor's Chapter 13 plan cannot be confirmed where it improperly schedules a debt previously discharged under Chapter 7. The successive filing of a Chapter 7 bankruptcy and a Chapter 13 plan has been called a "Chapter 20" situation.

To allow a Chapter 13 plan to schedule *in rem* remedies ignores the Chapter 7 discharge. Chapter 7 provides a debtor with a discharge of "all debts" and "any liability on a claim." The effect of the discharge "voids any judgment" and prohibits creditors from considering "any discharged debt as a personal liability of the debtor, or from property of the debtor." 11 U.S.C. §524.

The Chapter 7 bankruptcy discharge destroys the traditional relationship between a mortgagor and mortgagee. As a result of the Chapter 7 discharge, the "debt" is extinguished. The remaining *in rem* remedy passes through the Chapter 7 discharge and is, thus, not a "debt."

Likewise, the Bank is not a "creditor" holding a "claim" on a "debt." The Tenth Circuit correctly characterized and interpreted these terms. The Bank does not

have a "claim" as defined in 11 U.S.C. §101(4). The Bank has no "right to payment" because Johnson's personal liability has been discharged under Chapter 7. Moreover, the Bank has no "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment." 11 U.S.C. §101(4)(B). As a result of the Chapter 7 discharge, the equitable remedy does not give rise to a "right to payment" as discussed in the legislative history to §101(4)(B). Furthermore, there is no longer anything for a debtor to breach.

The Bank's *in rem* remedy is not a "claim against the debtor" that includes a "claim against property of the debtor." 11 U.S.C. §102(2). The Code's rules of construction confirm that these phrases are not equivalent. The significant legislative history of 11 U.S.C. §102(2) establishes that there is not a nonrecourse loan agreement. The parties clearly bargained for a recourse loan. To reach the conclusion that an *in rem* remedy converts the parties' relationship into a "nonrecourse loan obligation" ignores the effect of the Chapter 7 discharge and other established Bankruptcy Code provisions. Allowing an *in rem* remedy to be considered a debt also forces a unilateral reaffirmation on the Bank.

Congress did not contemplate such results; it intended Chapter 13 and Chapter 7 of the Bankruptcy Code to be alternative, rather than supplemental, remedies.

Notwithstanding that the Bankruptcy Code and its legislative history do not contemplate that an *in rem* remedy is a "debt" in Chapter 13, the uncontroverted

facts in this case establish that Johnson's plan is not proposed in good faith and is not feasible.

G. ARGUMENT

This case presents the issue of whether a debtor, after receiving a discharge in Chapter 7 of a mortgage obligation secured by a promissory note, can file a subsequent Chapter 13 and schedule for payment the remaining *in rem* remedy in an effort to retain the property. This maneuver has been referred to as a "Chapter 20" bankruptcy.

1. "CHAPTER 20" JUDICIAL DETERMINATIONS

The "Chapter 20" issue is divided into two distinct lines of thought. The majority of the decisions, led by the Tenth Circuit decision in this case, have found that a debtor may not reschedule a "debt" in a Chapter 13 plan that had been discharged in a prior Chapter 7 bankruptcy.[2] The rationale supporting these cases is that the mortgagee no longer held a "claim against the debtor," but held only a lien against the debtor's property, since the mortgage obligations had been discharged in Chapter

[2] See, e.g. *In Re Johnson*, 904 F.2d 563 (10th Cir. 1990); *In Re Russo*, 94 B.R. 127 (Bankr. N.D. Ill. 1988); *In Re Reyes*, 59 B.R. 301 (Bankr. S.D. Cal. 1986); *In Re McKinstry*, 56 B.R. 191 (Bankr. D. Vt. 1986); *In Re Lawson*, 120 B.R. 859 (Bankr. W.D. Ky. 1990); *In Re Brown*, 52 B.R. 6 (Bankr. S.D. Ohio 1985); *Associates Financial Serv. Corp. v. Cowen*, 29 B.R. 888 (Bankr. S.D. Ohio 1983); *Matter of Fryer*, 47 B.R. 180 (Bankr. S.D. Ohio 1985); *In Re Hundley*, 99 B.R. 306 (Bankr. E.D. Va. 1989).

7. Since a lien was not accompanied by any note, obligation, debt, or right to payment, the creditor was no longer a "creditor" holding a "claim." *In Re Johnson*, 904 F.2d at 565. The majority of the decisions recognized that the "claim against the debtor" included "claim against property of the debtor." 11 U.S.C. §102(2). However, those courts acknowledged the significance of the legislative history of §102(2) regarding "nonrecourse loan agreements," and found no "claim against property of the debtor." Courts adhering to the majority view found no bargain or agreement for a nonrecourse mortgage loan. These cases also found that such a plan forced a unilateral reaffirmation of the debt upon a creditor and circumvented the disposable income requirement of §1325(b)(1)(B).

Johnson relies on decisions reaching the opposite result which conclude that a debtor may, through a Chapter 13 plan, cure arrearages and defaults on a mortgage debt previously discharged under Chapter 7.[3]

The cases cited by Johnson misconstrued an *in rem* remedy as a claim which could be amortized and discharged in a Chapter 13 plan. Those courts held that debtors were not personally liable on a debt in a Chapter 7 bankruptcy, but then construed the surviving lien, or *in*

[3] See, e.g. *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989); *Matter of Metz*, 820 F.2d 1495 (9th Cir. 1987); *Grundy Nat. Bank v. Johnson*, 106 B.R. 95 (W.D. Va. 1989); *In Re Ligon*, 97 B.R. 398 (Bankr. N.D. Ill. 1989); *In Re Smith*, 94 B.R. 216 (Bankr. M.D. Ga. 1988); *In Re Klapp*, 80 B.R. 540 (Bankr. W.D. Okla. 1987); *In Re Lagasse*, 66 B.R. 41 (Bankr. D. Conn. 1986); *In Re Lewis*, 63 B.R. 90 (Bankr. E.D. Pa. 1986).

rem remedy, on real estate as a personal liability in the debtors' subsequently filed Chapter 13 cases. The minority view also found that upon the discharge of a secured debt, the debt relationship of the parties was converted to a nonrecourse loan obligation. These courts ignore that there was no agreement for a nonrecourse loan. The minority view also overlooked §102(2)'s illuminating legislative history. These courts then construed §102(2) as authority that a lien or an *in rem* remedy is a "debt."

It is interesting to note that in every decision cited by Johnson for his position, the court reviewed a Chapter 13 plan that cured arrearages and reinstated a previously-discharged mortgage debt. Johnson's plan does not cure arrearages or reinstate debt.

2. JOHNSON'S CHAPTER 7 DISCHARGE EXTINGUISHES ALL "CLAIMS" AND "DEBTS"

To allow a debtor to retain property, after a Chapter 7 discharge of personal liability on that property, by scheduling payments on the *in rem* remedy surviving the discharge, ignores the effect of the Chapter 7 discharge. A Chapter 7 discharge of personal liability affects the status of the parties in a subsequently filed Chapter 13 bankruptcy. The effect of that discharge must be considered.

11 U.S.C. §727(b) provides a Chapter 7 debtor with a discharge of "all debts" and "any liability on a claim." The effect of a debtor's discharge in 11 U.S.C. §524:

> *Voids any judgment* at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under §727. . . . (emphasis added).

According to the legislative history:

> Subsection (a) specifies that a discharge in a bankruptcy case . . . operates as an injunction against the commencement or continuation of an action, the employment of process, or any act . . . to collect recover or offset any discharged debt as a *personal liability of the debtor*, or *from property of the debtor* . . . (emphasis added).

H.Rep. No. 95-595, 95th Cong., 1st Sess. 365-6 (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. 80 (1978).

Creditors may desire for the indebtedness to remain in place after a discharge; however, it does not. As a result of the discharge, a debtor's indebtedness is extinguished and the creditor's money judgment is void. *Chandler Bank of Lyons v. Ray*, 804 F.2d 577 (10th Cir. 1986). Johnson's promissory note, when reduced to judgment on February 9, 1987, became merged into the judgment.[4] Johnson was relieved of any personal liability on that judgment by Sections 727 and 524 of the Bankruptcy Code. All that remains is the Bank's right to an *in rem* remedy. Johnson inaccurately characterizes an *in rem* remedy as a liability, a debt, or an obligation. An *in rem* remedy is a right or remedy accruing to a creditor. Such right may or may not be exercised by the creditor. It is not an obligation flowing from the debtor. However, for Johnson's argument to be plausible, he must mischaracterize an *in rem* remedy as an obligation of a debtor.

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[4] *Anderson v. Anderson*, 155 Kan. 69, 123 P.2d 315 (1942).

In the present case, the relationship between the Bank and Johnson is not the ordinary relationship found in a Chapter 13 bankruptcy. Johnson's personal liability on his promissory notes to the Bank have been discharged in his Chapter 7 proceeding. While an *in rem* remedy survives or "passes through" the bankruptcy, an underlying debt clearly does not. *Chandler*, 804 F.2d at 579. What may have been a claim or debt in the Chapter 7 bankruptcy no longer exists as a result of the Code's discharge provisions and cannot be a claim or debt in a subsequent Chapter 13 proceeding.

The idea that the Bank's *in rem* remedy is a claim under the Bankruptcy Code not only ignores the effect of a discharge but unfolds a paradox. If, indeed, a claim does encompass *in rem* remedies, there would be no reason to file a Chapter 13 bankruptcy. The *in rem* remedy would simply be discharged along with a debtor's personal liability in Chapter 7. The remedies of the Code, including Chapter 13 bankruptcy, would be rendered superfluous. Secured status would no longer exist. Mortgages and promissory notes would be ineffective and unenforceable, because creditors would never be able to realize on their collateral.

The logical conclusion to Johnson's argument is that a "right to payment" survives only where there is a secured claim; i.e., where there is property or collateral. The Bankruptcy Code definition of "claim" does not distinguish a "right to payment" between secured claims and unsecured claims. Johnson realizes that the only way an *in rem* remedy could ever be construed as a debt is if the "right to payment" and, thus, the "claim" survived his Chapter 7 bankruptcy. The flaw in this theory is that, if the "right to payment" survives a Chapter 7 discharge,

then it survives discharge for both secured and unsecured claims in any bankruptcy chapter, unless specifically excepted by the Code.

3. UNDER THE BANKRUPTCY CODE AND ITS LEGISLATIVE HISTORY THE BANK IS NOT A "CREDITOR" WITH A "CLAIM" AGAINST A "DEBT"

Bankruptcy Code

As a consequence of the Chapter 7 discharge, the Bank's position is not that of a "creditor" as it relates to a Chapter 13 proceeding. Likewise, there is no "claim" or "debt" as those terms are defined.

The definitions of "creditor," "debt," and "claim" are crucial to the examination of the issue before this Court.

"Creditor," defined at 11 U.S.C. §101(9), means an "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor; . . . "

"Debt," as defined at 11 U.S.C. §101(11), "means liability on a 'claim.' "

"Claim" is defined at 11 U.S.C. §101(4) and means:

(A) *right to payment*, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) *right to an equitable remedy for breach of performance if such breach gives rise to a right to payment*, whether or not such right to an equitable remedy is reduced to judgment,

> fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. (emphasis added)

Since this case involves statutory construction, the starting point is with the text itself.

> In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.

Kelly v. Robinson, 479 U.S. 36, 43, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986).

The Tenth Circuit correctly held that the Bank does not hold a claim as defined by the Bankruptcy Code.[5] The Bank does not hold a "claim" because it does not hold a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment" as defined in 11 U.S.C. §101(4)(B). At most, the Bank has an *in rem* remedy. The Bank may foreclose upon the property, but it stretches the limits of the Code to construe the right to foreclosure as a "right to payment."

There is nothing for Johnson to "breach," which would give rise to a "right to payment" as provided in §101(4)(B) of the Code. Even if it could be construed that there was some type of breach by Johnson, it would not give rise to a "right to payment" because he has been discharged from any "right to payment" occasioned by a so-called "breach." Any equitable remedy a Bank may have can never give rise to a "right to payment" from a

[5] Pet. Cert. App. 7; *In Re Johnson*, 904 F.2d 563, 566 (10th Cir. 1990).

debtor, upon the debtor's breach of performance, unless a new "debt" is created after discharge.

Legislative History

The meaning of the relevant Code provisions is not always evident. Numerous courts have wrestled with the definitions of "creditor," "claim," and "debt." As a result of the different interpretations, the courts of appeals are divided on this issue and have turned to the legislative history to clarify these definitions.[6] See *In Re Johnson*, 904 F.2d 563 (10th Cir. 1990); *Matter of Metz*, 820 F.2d 1495 (9th Cir. 1987); *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989). This Court has also referred to the legislative history in examining the definitions of "debt," "claim," or "creditor." *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. ___, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990); *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct. 353, 93 L.Ed.2d 216 (1986).

Section 101(4)(B)'s legislative history demonstrates what a "right to an equitable remedy for breach of performance if such breach gives rise to a right to payment" was not intended to address:

> . . . rights to an equitable remedy for a breach of performance with respect to which such breach *does not* give rise to a right to payment are *not* "claims" and would therefore *not* be susceptible to discharge in bankruptcy. (emphasis added).

[6] Johnson also recognizes " . . . an understanding of the legislative history of the statutory provision[s] in question are necessary to a determination of this case . . . " Pet. Brief, pp. 26-27.

124 Cong. Rec. H 11,090 (daily ed. Sept. 28, 1978); S. 17,406 (daily ed. Oct. 6, 1978).

The legislative history specifies that the language in 11 U.S.C. §101(4)(B) was intended to:

> . . . cause the liquidation or estimation of contingent rights of payment for which there may be an alternative equitable remedy with the result that the equitable remedy will be susceptible to being discharged in bankruptcy. For example, in some States, a judgment for specific performance may be satisfied by an alternative right to payment, in the event performance is refused; in that event, the creditor entitled to specific performance would have a "claim" for purposes of a proceeding under title 11.

Id. Therefore, instead of an equitable remedy being discharged, a particular creditor would have a "claim" under the Bankruptcy Code because of the creditor's alternative "right to payment." The Bank does not have such an alternative "right to payment" or it would have been exercised seven years ago.

4. THE BANK DOES NOT HOLD A CLAIM AGAINST PROPERTY OF THE DEBTOR AS DEFINED BY 11 U.S.C. §102(2)

Johnson contends that the Bank holds a "claim" which can be administered in his Chapter 13 bankruptcy because 11 U.S.C. §102(2) provides " 'claim against the debtor' includes 'claim against property of the debtor.' " Johnson substitutes §102(2) into various Code sections to illustrate his point.[7] The same exercise may be completed by the Bank but with different results.

[7] See Pet. Brief, pp. 25-26.

To conclude that an *in rem* remedy is a "claim against the property of the debtor" and, thus, a "claim" ignores other relevant Bankruptcy Code provisions. Using all of the Code provisions at issue here rather than a single sentence or member of a sentence leads to quite opposite results. At the outset, it should be noted that Johnson would not even have this argument if not for his receipt of the property by quitclaim deed four days prior to his Chapter 13 filing.

The definitions of "debt" and "claim" should be used coextensively. *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. at ___. Furthermore, "debt" means "*liability* on a claim." 11 U.S.C. §101(11). (emphasis added). Applying the definitions of "creditor," "debt," and "claim" into the phraseology of §102(2) used by Johnson results in the following:

> "liability" on a (right to payment or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment) against the debtor, including property of the debtor.

Using a holistic approach, the Bank is not a "creditor" holding a "claim" against a "debt" of the debtor. The clear language of the Bankruptcy Code provides that the liability and debt must still flow from the debtor regardless of whether there is a claim against property of the debtor. This statutory intent is buttressed by the fact that the definition of creditor means a "claim against the debtor," not a claim against a third party, cosigner, mortgagee, pledgor, or parent. 11 U.S.C. §101(9).

The fallacy of Johnson's argument is that it construes "claim against property of the debtor" to mean exactly

the same as "claim against the debtor," and therefore, he uses them interchangeably. The language of 11 U.S.C. §102(2) reads, "includes" rather than "means."

The Bankruptcy Code defines some terms by use of the word "means," while others read "includes." Those stating a definition in terms of "means" attempt a precise definition. The definitions using the term "include(s)" are not to exclude other definitions of the term. 2 *Collier on Bankruptcy* ¶101.00(2) (15th Ed. 1990). By using "includes" rather than "means," Congress specifically indicated its intent that "claim against property of the debtor" is not equivalent to "claim against the debtor." Furthermore, "claim against property of the debtor" does not, under the Code, include "claim against the debtor" because Congress did not use the word "means." Assuming arguendo that a creditor holds a "claim against property of the debtor," it must still hold a "claim against the debtor" and, thus, a "claim," because the definition does not flow in reverse. The Bank clearly has no claim as defined in 11 U.S.C. §101(4).

The legislative history of 11 U.S.C. §102(2) also reveals that the definition of "claim against the debtor" was not intended to address an *in rem* remedy or right to an equitable remedy as held by the Bank:

> Paragraph (2) specifies that "claim against the debtor" includes claim against property of the debtor. This paragraph is intended to cover *nonrecourse loan agreements* where the creditor's only rights are against property of the debtor, and not against the debtor personally. Thus, such an agreement would give rise to a claim that would be treated as a claim against the debtor personally, for the purposes of the Bankruptcy Code. . . . (emphasis added).

H.Rep. No. 95-595, 95th Cong., 1st Sess. 316 (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. 28 (1978).

Johnson adopts the position that when a debtor receives a discharge of his secured debt, the debt relationship between the parties is changed to a nonrecourse obligation, which may be cured in a Chapter 13 plan. *In Re Lagasse*, 66 B.R. 41, 43 (Bankr. D. Conn. 1986). The Ninth and Eleventh Circuits simply adopt the *Lagasse* rationale without analysis and with little explanation of their decisions. *Matter of Metz*, 820 F.2d 1495 (9th Cir. 1987); *In Re Saylors*, 869 F.2d 1434 (11th Cir. 1989). Based upon the *Lagasse* rationale that successive bankruptcy filings were acceptable, *Metz* and *Saylors* concluded that the inquiry was whether the debtor submitted the Chapter 13 plan in good faith.

The Tenth Circuit rejected the proposition that a mortgage debt, discharged in Chapter 7, could be transformed into a nonrecourse loan agreement and, thus, subject to cure through a subsequent Chapter 13 plan. In reaching this conclusion, the Tenth Circuit closely examined the statutory language and legislative history of the Bankruptcy Code. This analysis went beyond the reasoning of either *Metz* or *Saylors*. Based upon this in-depth review, the Tenth Circuit determined that the Bank was not a "creditor," since the lien remaining after a Chapter 7 discharge was not a "claim against the debtor." Moreover, the Tenth Circuit found that the transformation of a debt into a nonrecourse loan agreement was inconsistent with the Bankruptcy Code provisions and the Congressional intent of §102(2). The Tenth Circuit found no "agreement"

between Johnson and the Bank for a nonrecourse mortgage loan.

The present case does not involve a nonrecourse loan agreement. As a result of the Chapter 7 discharge, the traditional mortgagor-mortgagee relationship no longer exists. The promissory note secured by the mortgage has merged into the judgment. The promissory note is no longer evidence of a debt that can be made the basis of a subsequent action.[8] The Bank holds only an *in rem* remedy, which is not accompanied by any obligation, liability, note, debt, or right to payment. Thus, the Bank's *in rem* remedy is not such an agreement that would give rise to a claim that would be treated as a claim against the debtor personally for purposes of the Bankruptcy Code, as contemplated by the legislative history of 11 U.S.C. §102(2).

To reach the conclusion that an *in rem* remedy converts the whole note to a "nonrecourse loan agreement," one must ignore the effect of a Chapter 7 discharge, disregard personal liability, discard essential elements of contract law relating to promissory notes, and focus only on the surviving *in rem* remedy. For the foregoing reasons, the Code and its legislative history do not support such a narrow focus.

It is apparent from a review of the whole law, the definitions, and legislative history of "claim," "claim against the debtor," "claim against property of the debtor," and nonrecourse loan agreements that the Bank's *in rem* remedy is not a claim.

[8] *Anderson v. Anderson*, 155 Kan. 69, 123 P.2d 315 (1942).

5. CHAPTER 13 PROVIDES ALTERNATIVE RATHER THAN SUPPLEMENTAL RELIEF TO CHAPTER 7

Congress intended Chapter 13 and Chapter 7 of the Bankruptcy Code to be alternative, rather than supplemental, remedies.[9]

The "wage earner" provisions of Chapter XIII were added to the Bankruptcy Act to provide "a remedy for the dilemma facing a debtor seeking to repay, rather than avoid, his obligations . . . "[10] The purpose of Chapter XIII under the Bankruptcy Act of 1898 was to permit an individual to repay debts.[11] The legislative history accompanying the Bankruptcy Code enacted in 1978 by Congress notes that the purpose of the new Chapter 13 is to enable individuals to repay debts, as opposed to a Chapter 7 liquidation case, where debtors surrender nonexempt assets for liquidation and sale by the trustee.[12] In

[9] *In Re Silva*, 82 B.R. 845, 846 (S.D. Ohio 1987).

[10] *Perry v. Commerce Loan Co.*, 383 U.S. 392, 395, 86 S.Ct. 852, 15 L.Ed.2d 827 (1966).

[11] S.Rep. No. 95-989, 95th Cong., 2d Sess. 12 (1978).

[12] The new Chapter 13 undertakes to solve these problems insofar as bankruptcy law can provide a simply yet precise and effective system for *individuals to pay debts* under bankruptcy court protection and supervision. . . . " S.Rep. No. 95-989, 95th Cong., 2d Sess. 13 (1978). (emphasis added).

"The purpose of Chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period. . . . "

(Continued on following page)

enacting the Bankruptcy Code, Congress specifically provided for liquidation cases under Chapter 7 and rehabilitation or adjustment of debts of an individual with regular income under Chapter 13.[13] Rather than filing a Chapter 13 bankruptcy plan in the first instance, Johnson elected to file a Chapter 7 liquidation. The Chapter 7 discharge of unsecured debt enabled Johnson to become eligible as a debtor in Chapter 13.[14] At no time did Johnson seek reaffirmation of any of his debts. Congress did not contemplate, or intend to sanction, a debtor's Chapter 13 plan rescheduling a prior "debt" on the heels of his *in personam* Chapter 7 discharge.

11 U.S.C. §706 also indicates Congressional intent to provide alternative remedies under the distinct chapters of the Bankruptcy Code. Section 706 implicitly allows a one-time conversion from Chapter 7 liquidation to a reorganization, or individual repayment case under Chapter

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"The benefit to the debtor of developing a plan of repayment under chapter 13, rather than opting for liquidation under chapter 7, is that it permits the debtor to protect his assets. In a liquidation case, the debtor must surrender his non-exempt assets for liquidation and sale by the trustee. Under chapter 13, the debtor may retain his property by agreeing to repay his creditors. . . . " H.Rep. No. 95-595, 95th Cong., 1st Sess. 118 (1977).

[13] See, 11 U.S.C. §701 et seq. and 11 U.S.C. §1301 et seq.

[14] 11 U.S.C. §109(e) provides that "only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 . . . may be a debtor under chapter 13 of this title."

11, 12, or 13. This is a further indication that the Bankruptcy Code was intended to provide alternative forms of relief.[15] Johnson had the opportunity to convert his Chapter 7 bankruptcy but did not. Instead, he utilized the discharge provisions of Chapter 7 to eliminate enough unsecured debt to become eligible as a "debtor" in Chapter 13.[16] He then proposed a Chapter 13 plan to discharge *in rem* remedies he could not discharge in his Chapter 7 proceeding. It was Congress' aim to allow a one-time conversion but not to allow the successive filing of a Chapter 13 after having been discharged in Chapter 7 bankruptcy. For example, 11 U.S.C. §706(d) specifies " . . . a case may not be converted to a case under another chapter of this title unless the debtor may be a debtor under such chapter." Yet, Johnson's Chapter 13 plan attempts a maneuver specifically forbidden by §706(d), since his unsecured debt exceeded the limits in §109(e) of the Bankruptcy Code. Johnson's attempted "quasi-liquidation" under Chapter 13 bankruptcy circumvents the clear prohibitions of Chapter 7 of the Bankruptcy Code. There is nothing to suggest Congress intended such a circumvention of the provisions of the Bankruptcy Code. Otherwise, §706 and other chapters of the Code would be mere surplusage. The differences preserved by various chapters in the Code evidence Congressional intent to have alternative remedies. "Congress surely intended that a debtor achieve its goals by the filing of a single case. This Court considers it a misuse of the bankruptcy

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[15] See, H.Rep. No. 95-595, 95th Cong., 1st Sess. (1977); S.Rep. No. 95-989, 95th Cong., 2d Sess. (1978).

[16] See, 11 U.S.C. §109(e).

process to file one case, then, failing to achieve the intended goals, to refile a second case." *In Re Russo*, 94 B.R. 127, 129 (Bankr. N.D. Ill. 1988).

6. "CHAPTER 20" BANKRUPTCY PLANS ARE CONTRARY TO THE PROVISIONS OF THE BANKRUPTCY CODE

Before a Chapter 13 plan can be confirmed, a debtor must satisfy the requirements of 11 U.S.C. §1325. Section 1325(a)(4) states:

> The value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under chapter 7 of this title on such date.

Johnson's Chapter 13 plan proposes to pay *his* estimate of the value of the land with minimal yearly payments and a balloon payment of $80,625.92 at the end of his five-year plan. (JA 14-20). Johnson's plan provides no payment for unsecured or undersecured claims. If the estate of the debtor were liquidated under Chapter 7, the Bank would receive more than the value of the plan payments as of the effective date of the plan. The Bank would receive the property and not have to accept minimal payments spread over five years. Due to Johnson's discharge of his unsecured debt and his proposed balloon payment at the end of five years, he is able to effectively nullify the provisions of §1325(a)(4).

Whether the right of a debtor to surrender property to a mortgagee is a "right to payment" is not at issue here. A surrender of the property was never suggested in

Johnson's plan because retention of the property for minimal payment is the compelling reason his Chapter 13 bankruptcy was filed. If the property is not retained, then Johnson has no income or government subsidies to fund the plan. If such a surrender of property would have occurred, there would have been no bankruptcy estate.

The confirmation of Johnson's Chapter 13 plan would circumvent the requirement of 11 U.S.C. §1325(b)(1)(B) that all of "debtor's" disposable income be applied to plan payments.

> In the Chapter 7 the slate is wiped clean of unsecured debts. In the subsequent Chapter 13, even if the debtor has disposable income that would have been available to pay unsecured creditors, it is not necessary to do so because there are no unsecured debts, all of them having been discharged in the prior Chapter 7.

In Re Russo, 94 B.R. 127, 130 (Bankr. N.D. Ill. 1988)

If the plan is confirmed, the Bank will essentially be required to make a new loan to Johnson; one without personal liability.

Sections 521 and 524 of the Bankruptcy Code permit a debtor to reaffirm a debt in Chapter 7. Under those provisions, reaffirmation is a voluntary agreement. It cannot be forced upon either debtors or creditors. At no time did Johnson avail himself of the rights under these provisions to cure or reaffirm his Chapter 7 debt. Filing a Chapter 13 bankruptcy compelling a creditor to accept payments after a Chapter 7 discharge forces a unilateral reaffirmation upon that creditor. 11 U.S.C. §524(c); *In Re McKinstry*, 56 B.R. 191, 193 (Bankr. D. Vt. 1986); *In Re Russo*, 94 B.R. at 129. "Section 524 of 11 U.S.C. is a

debtor's shield against the continuation of acts to collect a discharged debt. It cannot be used as a sword to compel a creditor to reaffirm a debt within a Chapter 7 case, nor to force a reaffirmation in a subsequent Chapter 13 case." *In Re McKinstry*, 56 B.R. at 193.

Johnson is not only attempting a unilateral reaffirmation, but is also endeavoring to reaffirm only part of the debt. Johnson does not seek to reaffirm any of the unsecured debt discharged in his Chapter 7. Neither does he want to reaffirm any debt he characterizes as undersecured in his Chapter 13 plan.

Successive bankruptcy filings improperly extend, or reimpose, the automatic stay provisions of 11 U.S.C. §362.[17]

> The automatic stay is one of the most powerful weapons known to the law. It arises not from an order of the court after a hearing on the merits, but upon the mere filing of a case. It is a Congressionally-imposed stay, not a judicially-imposed stay.
>
> In the absence of extraordinary circumstances, its reimposition in a second case filed within one month after the closing of a prior case should not be viewed with favor by the courts.

In Re Russo, 94 B.R. at 129.

Johnson has benefited from the automatic stay provisions since October 9, 1984, when his Chapter 7 petition was filed. In early 1985, the Bank received relief from the

[17] *In Re Russo*, 94 B.R. at 128; citing *In Re Gates*, 42 B.R. 4 (Bankr. N.D. Ga. 1983); *In Re Perez*, 43 B.R. 530 (Bankr. S.D. Tex. 1984); *In Re Hill*, 34 B.R. 21 (Bankr. M.D. Fla. 1983).

automatic stay, but such stay was reimposed by the filing of Johnson's Chapter 13 bankruptcy. The reimposition of the stay prevented a sheriff's sale of the property. On the one hand, the Bank received relief from the automatic stay and Johnson received a discharge in his Chapter 7, while on the other hand, another stay has been imposed by his Chapter 13 petition. This inconsistent application of the automatic stay provisions was not contemplated by Congress. Otherwise, any relief from the automatic stay would be meaningless. The continuing imposition of the automatic stay also extends Johnson's right to redeem property under Kansas law.[18] Johnson's "Chapter 20" plan has, so far, expanded his six-month redemption period to over seven years. What is even more ominous is that Johnson is painfully close to completing the six-year bar to refiling another Chapter 7 bankruptcy and imposing yet an additional automatic stay with rights to convert the case to Chapter 13.

Johnson's plan also vitiates the six-year filing requirement in §727 of the Bankruptcy Code. Johnson was barred from filing another Chapter 7 bankruptcy, so, instead, he filed a Chapter 13 plan proposing to pay the value of the property after the discharge of unsecured debt. This Chapter 13 proposal is nothing more than a veiled Chapter 7.

Johnson's Chapter 7 proceeding had also not yet been closed when he filed his Chapter 13 plan. A determination of unsecured claims and objections to the trustee's intended distribution of estate funds was not made until

[18] Kansas Statutes Annotated 60-2414; See, Pet. Brief, p. 20.

March 10, 1988.[19] At one time, Johnson had two estates being administered by two trustees, one under Chapter 7 and one under Chapter 13 of the Bankruptcy Code. This is clearly contrary to the function and purpose of the Bankruptcy Code. In *Associated Financial Serv. Corp. v. Cowen*, 29 B.R. 888, 894 (Bankr. S.D. Ohio 1983), the court stated:

> The filing of a petition in bankruptcy creates an estate consisting of the debtor's property . . . [a] debtor possesses only one estate for the purpose of trusteeship . . .
>
> The filing of two simultaneous petitions is contrary to the obvious contemplated function of the Bankruptcy Code to resolve debtors' financial affairs by administration of a debtor's property as a single estate under a single Chapter within the Code. 11 U.S.C. §§ 103, 301, 302, and 303. The Bankruptcy Code provides different discharge remedies in different Chapters, and such remedies are intended to be exclusive for each estate. 11 U.S.C. §§ 103, 301, 523, 727, and 1328.

Upholding the Tenth Circuit's decision in this case will not affect the precedent of *Pennsylvania Dept. of Public Welfare v. Davenport*, 495 U.S. ___, 110 S.Ct. 2126, 109 L.Ed.2d 588 (1990). In *Davenport*, the debtors were convicted of welfare fraud and sentenced to probation. As a condition of the probation, they were required to make restitution payments. This Court concluded that restitution orders were "debts" as defined in §101(11), because

[19] The facts described in this paragraph are not in the record because they occurred in Johnson's Chapter 7 bankruptcy. These facts are not disputed.

if restitution obligations were not paid, debtors risked the threat of revocation of probation and incarceration. Therefore, a restitution order is an enforceable obligation, hence, a "right to payment," and a "debt." In the present case, the Bank has a right to an equitable remedy (foreclosure) whether or not Johnson pays. Furthermore, Johnson has no obligation to pay anything. The Bank has no enforceable obligation because there is no "debt" or "right to payment."

In *Davenport*, Justice Marshall, delivering the opinion of the court, stated:

> Had Congress believed that restitution obligations were not "debts" giving rise to "claims," it would have had no reason to except such obligations from discharge in §523(a)(7).

495 U.S. at ___. Had Congress intended such *in rem* remedies to be "debts" giving rise to "claims," it could have excepted such remedies from discharge in U.S.C. §523 as it did for the penal sanctions discussed in *Davenport*.

In Section 523 of the Code, Congress prevented debtors from discharging certain debts based upon public policy grounds. However, Congress intended a broader discharge for Chapter 13 debtors than those in Chapter 7 because some, but not all, of the exceptions to discharge in §523(a) were extended to Chapter 13 bankruptcies.[20]

[20] "The super discharge of Chapter 13 was provided by Congress as an incentive for the debtor to commit to a repayment plan under Chapter 13 as an alternative to providing creditors nothing under Chapter 7. Given the proper case, the

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Davenport held that restitution obligations were dischargeable debts in Chapter 13. Otherwise, Congress would not have excepted such obligations from Chapter 7 discharge in §523. On the other hand, *in rem* remedies survive or pass through the bankruptcy, while "debts" are extinguished.[21] If Congress had intended for *in rem* remedies to be "debts" giving rise to "claims" that are nondischargeable in Chapter 7 but dischargeable in Chapter 13, such provisions would have been codified. Since *in rem* remedies are not listed as exceptions to sections 523 or 1328, they are not "debts."

If Congress had intended, by §523 of the Code or any other provision, to discharge *in rem* remedies, "we can be certain that there would have been hearings, testimony, and debate concerning consequences so wasteful, so inimical to purposes previously deemed important, and

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court need not, and should not, neutralize that incentive by confirming Chapter 13 plans that are, in essence, veiled Chapter 7 cases. Logic requires there be an articulate standard distinguishing entitlement to dischargeability under Chapter 13 vis-a-vis Chapter 7. To put it otherwise, there must be criteria which preclude bypass of nondischargeability under Chapter 7 simply by detouring or converting to Chapter 13. Where there is an absence of any significant factual element distinguishing the circumstances of a Chapter 13 petition with a substantial nondischargeable debt from those attendant to a Chapter 7 petition, the debtor should not be permitted to nullify a major provision of 11 U.S.C. §523 merely by paying an insignificant portion of the nondischargeable debt." *In Re Warren*, 89 B.R. 87, 95 (9th Cir. BAP 1988). See also H.R. Committee Print No. 16, 96th Cong., 2d Sess. (1981). See also 11 U.S.C. §1328.

[21] See, discussion, supra at 8-11.

so likely to arouse public outrage." *United States v. Ron Pair Enterprises*, 489 U.S. 235, ___, 109 S.Ct. 1026, 103 L.Ed.2d 290 (1989).

7. JOHNSON'S CHAPTER 13 PLAN WAS NOT PROPOSED IN GOOD FAITH AND IS NOT FEASIBLE

While not reaching the good faith and feasibility issues because of its decision on the "Chapter 20" issue, the Tenth Circuit indicated the Bank presented compelling arguments on both issues. *In Re Johnson*, 904 F.2d at 566 (10th Cir. 1990).

It is the general rule that the Bank, the prevailing party, can "defend its judgment on any ground properly raised below, whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476, n.20, 99 S.Ct. 740, 58 L.Ed.2d 740 (1979).

The bankruptcy court, in confirming Johnson's Chapter 13 plan, only addressed the good faith of the debtor in the context of successive bankruptcy filings. Since successive filings were not bad faith *per se*, the bankruptcy court held there was no indication of bad faith on the part of the debtor to prohibit confirmation of the plan. Likewise, a perfunctory review resulted in the finding that Johnson's plan was feasible.

The bankruptcy court's findings of fact are usually accepted, unless they are clearly erroneous.

Fed.R.Bankr.P. 8013; Fed.R.Civ.P. 52(a). The clearly erroneous standard is not applicable, however, when reviewing the bankruptcy court's rulings on questions of law or on mixed questions of law and fact. *In The Matter of Tri-State Equipment Co., Inc.*, 792 F.2d 967 (10th Cir. 1986); *In Re Golf Course Builders Leasing, Inc.*, 768 F.2d 1167 (10th Cir. 1985); *Stafos v. Jarvis*, 477 F.2d 369 (10th Cir. 1973), *cert. denied*, 414 U.S. 944 (1973). While the bankruptcy court made clearly erroneous findings of fact, most of the relevant facts in this case are uncontroverted and established. Mixed questions of fact and law arise "when the facts are admitted or established and the law is undisputed." *In the Matter of Tri-State Equipment Co., Inc.*, 792 F.2d at 970.

> If what must be decided in a mixed question involves primarily a consideration of legal principles, then the appellate court reviews *de novo*.

Id.

Consequently, the record related to the good faith and feasibility of the plan can be reviewed *de novo*.

The majority of circuits have adopted a "middle road" approach to the good faith issue. *Flygare v. Boulden*, 709 F.2d 1344, 1347 (10th Cir. 1983). Each case is judged on its own facts after considering all circumstances. Several factors have been outlined for the guidance of bankruptcy courts. Application of the factors enumerated in *Flygare* and other cases to the findings made by the bankruptcy court as well as the undisputed evidence, leads to the reasonable conclusion that Johnson's plan was not proposed in good faith and therefore cannot be confirmed.

The Totality Of The Circumstances Displays The Lack Of Good Faith

A debtor's Chapter 13 plan must be "proposed in good faith and not by any means forbidden by law." U.S.C. §1325(a)(3). The term "good faith" is not defined in the Code or in the legislative history. Definitions and standards for determining good faith are not scarce. Although by no means universal, the majority of the courts generally conclude that a debtor's good faith should be determined on a case-by-case basis, considering the "totality of the circumstances."[22] This inquiry ultimately determines whether the plan conforms to the provisions, purpose and spirit of Chapter 13. *In Re Hundley*, 99 B.R. 306, 309 (Bankr. E.D. Va. 1989).

The bankruptcy court found "the record contains no indication that the debtor proposed his plan in bad faith." (R-BR 44; Pet. Cert. App. 30). This finding is clearly

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[22] See, *In Re Okoreeh-Baah*, 836 F.2d 1030, 1033 (6th Cir. 1988); *Flygare v. Boulden*, 709 F.2d 1344, 1347-1348 (10th Cir. 1983); *In Re Rasmussen*, 888 F.2d 703, 706 (10th Cir. 1989); *In Re Kitchens*, 702 F.2d 885, 888-889 (11th Cir. 1983); *Public Finance Corp. v. Freeman*, 712 F.2d 219, 221 (5th Cir. 1983); *Deans v. O'Donnell*, 692 F.2d 968, 972 (4th Cir. 1982); *In Re Estus*, 695 F.2d 311, 316-317 (8th Cir. 1982); *In Re Rimgale*, 669 F.2d 426, 432 (7th Cir. 1982). See also *Barnes v. Whelan*, 689 F.2d 193 (D.C. Cir. 1982); *In Re Johnson*, 708 F.2d 865, 868 (2nd Cir. 1983) (good faith is defined as "honesty of intention"); *In Re Goeb*, 675 F.2d 1386 (9th Cir. 1982) (determination of whether the debtors "acted inequitably"); *In Re Chinichian*, 784 F.2d 1440, 1444 (9th Cir. 1986) (intentions of the debtor and the legal effect of the confirmation of a Chapter 13 plan in light of the spirit and purpose of Chapter 13 are examined).

erroneous when applying the present uncontroverted facts to the applicable law.

In the mid-seventies, Johnson inherited the property at issue, which was free from any encumbrances. The property had producing oil and gas wells, from which Johnson received royalty payments. (R-BC 20). In 1978, Johnson borrowed money from Travelers and the Bank and in exchange executed promissory notes and mortgages. Johnson defaulted on the notes in 1983.[23] By that time he had amassed debt secured by the property in excess of $500,000.00. (R-BC 20).

Based on the default, the Bank initiated the foreclosure action on March 23, 1984. While the foreclosure action was proceeding, Johnson and his wife, on September 7, 1986, executed a deed to their son, transferring all of their ownership rights in the property at issue. Approximately one month later the Johnson's joint Chapter 7 bankruptcy was filed. On April 11, 1985, the Johnsons received their Chapter 7 discharge.[24]

Following the entry of an *in rem* judgment, sheriff's sale, appeal to the Kansas Supreme Court and an entry of a second *in rem* judgment after remand, the Bank scheduled a second sheriff's sale for April 3, 1987.[25]

On February 24, 1987, Johnson's wife, son and daughter-in-law executed quitclaim deeds to Johnson,

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[23] These facts are not disputed. See, Pet. Brief, pp. 3-4, n.1, n.2.

[24] The facts in this paragraph are not disputed. See, Pet. Brief, pp. 3-7, n.1, n.2.

[25] *Id.*

consolidating ownership of all subject property at issue in Johnson. Those deeds were filed for record on February 26, 1987. Four days later, on March 2, 1987, and one month before the scheduled April 3, 1987, sheriff's sale, Johnson filed his voluntary Chapter 13 petition.[26]

The acts of Johnson exemplify the exact type of abuse of process which the bankruptcy court should have considered bad faith but ignored.[27] Johnson has transferred property back and forth between his family to the detriment of the Bank, to avoid foreclosure sale and to gain advantage in his bankruptcy proceedings. His actions clearly establish the insincerity of his motives in seeking Chapter 13 relief. Further evidence of Johnson's improper motives is evident from his testimony in which he admitted that the purpose of the September, 1984, deed was to keep property from the trustee in his Chapter 7 bankruptcy.[28] Yet, the bankruptcy court below found no evidence of the debtor's bad faith. (R-BR 44; Pet. Cert. App. 30)

The Chapter 13 plan proposed by Johnson further establishes evidence of the lack of his good faith. Rather than scheduling payments over a three year period, Johnson proposed yearly payments over five years. Three-year plans are the general rule, unless cause is found for a longer period. 11 U.S.C. §1322(c). The bankruptcy court made no specific finding that cause existed to extend the payments over the maximum time permitted.

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[26] *Id.*

[27] R-BC 44; Pet. App. 30, n.3.

[28] R-BC 35; Tr. 6-23-87 at 64.

At the conclusion of five years, a balloon payment representing one-third of the payments will be due to the Bank. Plans proposing large balloon payments at the end are not feasible and reflect on good faith. *Matter of Brunson*, 87 B.R. 304 (Bankr.D.N.J. 1988); 5 *Collier on Bankruptcy* §1325.07 (15th Ed. 1990).

In order to meet this balloon payment, the bankruptcy court erroneously found that Johnson would be required to borrow approximately 56% of the market value of the property.[29] In actuality, the debtor would be required to borrow 163% of the appraised value of the property.[30]

The proposal for substantial borrowing at the conclusion of the plan is unrealistic, given the additional proposed borrowing for farm operations.[31]

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[29] R-BR 44; Pet. Cert. App. 31.

[30] The 163% figure is calculated as follows:

$ 80,625.92	Bank's balloon payment (R-BC 24; JA 20)
7,222.77	Other creditor's balloon payment (R-BC 24; JA 17)
72,000.00	1992 operating loan (R-BC 36; JA 70)
47,750.00	1991 operating loan (JA 63)
19,425.00	December 1, 1991, final payment (R-BC 24; JA 19)
$227,023.69	

$227,023.69 divided by $139,500.00 as the debtor's estimate of the market value equals 163%. (R-BC 20).

[31] Johnson's cash flow statements indicate the following amounts would need to be borrowed to operate the farm:

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The projected income included in the plan, less necessary expenses, would be inadequate to support the proposed borrowing and the scheduled payments. The income was expected to come from four sources: oil and gas royalties, custom work, government subsidies and crops. (JA 21, 26-72). The record reveals that the sources and amounts are speculative, exaggerated, dependent on factors outside of the debtor's control such as weather and prices, and fail to consider expenses necessary to generate the income.

Additional proof of the lack of good faith is apparent by comparing the first plan submitted with the later plan. Annual home expenses decreased by over fifty percent. Johnson deleted all expense attributable to the Mid-Kansas "debt" which he proposes to pay under his plan. Personal property taxes and support payments for Johnson's daughters were deleted without any explanation. Remaining expenses were reduced considerably. (Compare JA 11-12 and JA 36; R-BC 19 and R-BC 24).

The only participants in the plan are lien holders: the Bank and Mid-Kansas. There are no payments proposed to unsecured creditors. Johnson does not intend to cure his default on either mortgage by making payments on arrearages.

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1987	$ 35,000.00 (JA 35)
1988	28,750.00 (JA 42)
1989	30,000.00 (JA 49)
1990	30,000.00 (JA 56)
1991	47,750.00 (JA 63)
1992	152,625.00 (JA 70).

Since the submission of the plan in 1987, Johnson has received farm income and government subsidies.[32] Since 1987, only one payment under the plan has been made to the Bank. As of December, 1990, the debtor was delinquent on his plan payments in the sum of $109,890.[33] Even though the property at issue remains in Johnson's possession, he has consistently failed to pay his real estate taxes. The Bank has had to either pay the taxes or seek court order to compel Johnson to pay the taxes.[34]

The totality of the circumstances surrounding Johnson's Chapter 13 bankruptcy and the proposed plan clearly indicate that good faith and feasibility do not exist.

The bankruptcy court erroneously concluded that the plan was submitted in good faith on the sole factor of successive bankruptcy filings. This conclusion ignored the Bank's other objections. (R-BC 13, 17, 31, 33). A much broader inquiry into all circumstances must be conducted before a plan can be confirmed. *Flygare*, 709 F.2d at 1347-48.

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[32] As a result of Johnson's retention of the property, he estimated he would receive government payments in the following amounts:

1987	$18,951.00
1988	44,781.00
1989	47,605.00
1990	49,243.00
1991	29,494.00 (JA 21).

[33] These facts are not disputed. see, Pet. Brief, pp. 7, 12.

[34] R-BC 16; R-BC 64.

The Ninth and Eleventh Circuits incorrectly relied on evidence related to a single factor, successive filings, to find good faith on the part of a Chapter 13 debtor. While the Court in *Metz* acknowledged the "middle road" approach, very few factors were considered. It is significant to note, however, that at least the debtor in *Metz* proposed to cure his arrearage on his mortgage debt, plus pay interest on the arrearage and keep the mortgage payments current. *Metz*, 820 F.2d at 1498.

In *Saylors*, the Eleventh Circuit merely concentrated on the debtor's timing of his successive bankruptcy filings. Again, the debtor proposed to cure his mortgage arrearage and keep his mortgage payments current. However, any analysis of other factors pointing toward the debtor's good faith is absent.

For the above reasons, Johnson's Chapter 13 plan was not proposed in good faith because it improperly proposed debt avoidance rather than rehabilitation and repayment, the intended purpose of Chapter 13.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court affirm the decision of the Tenth Circuit Court of Appeals based either upon the holding that a debtor may not reschedule a debt previously discharged in a Chapter 7 bankruptcy or upon the uncontroverted facts indicating Johnson's lack of good faith and nonfeasibility of his plan, which also support the Tenth Circuit's decision. In the alternative, if this Court decides to reverse the decision of the Tenth Circuit Court of

Appeals, then the Bank respectfully requests this Court grant its petition for certiorari, Case No. 90-834, so that issues of good faith and non-feasibility may be addressed.

Respectfully submitted,

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No. 90-693

In The

Supreme Court of the United States

October Term, 1990

CURTIS REED JOHNSON,

Petitioner,

vs.

HOME STATE BANK,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

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B. TABLE OF AUTHORITIES

C. STATEMENT OF THE CASE

Petitioner (hereinafter "Johnson") does not dispute any portion of respondent's (hereinafter the "Bank") Statement of the Case, except that portion which states that "Johnson is *delinquent* in his payments under the plan in the amount of $109,890.00 as of December 1, 1990." (Res. Brief, p. 4, emphasis added). Johnson admits that he has made no payments to the Bank on the plan since the initial $10,000.00 payment which was due on December 1, 1987. However, since January 3, 1989, the date the district court's decision was entered reversing the order of the bankruptcy court which confirmed the plan, Johnson has had no obligation to make plan payments because there was no plan. Therefore, he is not "deliquent" on any plan payments.[1]

Also, the Bank states that "Johnson made no other payments to the trustee as required by the February 27, 1989, stay pending appeal." (Res. Brief, p. 3.) While Johnson admits that only one $17,000.00 payment was made to the trustee pursuant to the district court's order, the record is unclear as to whether the district court required additional payments by Johnson to the trustee as a condition of the continuation of the stay pending appeal. (See R-DC 24, 25, 26, 27, 28 and 29). Johnson asserts that after the district court entered its order of May 4, 1989 (R-DC 27), no further payments were required.

[1] Even if Johnson were to make plan payments, the Bank would have no right to them. Absent a confirmed bankruptcy plan, the Bank may only collect its judgment by selling Johnson's land.

D. ARGUMENT

1. THE EFFECT OF JOHNSON'S PRIOR CHAPTER 7 DISCHARGE IS LIMITED BY SECTION 524.

The Bank argues that because the term "debts" is used in § 727(b) in describing what is discharged by a Chapter 7 discharge, then necessarily the same "debts" cannot exist after a Chapter 7 discharge for purposes of a Chapter 13 bankruptcy. In other words, once the "debts" are discharged in the Chapter 7 proceeding, they no longer exist for the subsequent Chapter 13. However, the Bank's argument ignores the provisions of § 524.

The term "discharges" is not defined in the Bankruptcy Code. Therefore, when § 727(b) provides that "a discharge under subsection (a) of [§ 727] discharges the debtor from all debts that arose before the date of [the bankruptcy filing]," one must look to § 524 to determine the effect of a discharge. Section 524 provides as follows:

> (a) A discharge in a case under this title –
>
> (1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the *personal liability of the debtor* with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt *as a personal liability of the debtor,* whether or not discharge of such debt is waived;
>
> * * *

Thus, under section 727(b), when "debts" are discharged, only the personal liability of the debtor is extinguished; liens and *in rem* liabilities remain intact.

That Congress only intended to effect the *in personam* portion of indebtedness by granting a Chapter 7 discharge, is emphasized by the amendments made to section 524 by the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. 98-353, 98 Stat. 333 (1984). Prior to the amendment, section 524(a)(2) provided as follows:

> (a) A discharge in a case under this title –
>
> * * *
>
> (2) operates as an injunction against the commencement or continuation of an action, the employment of process, or any act, to collect, recover or offset any such debt as a personal liability of the debtor, *or from property of the debtor,* whether or not discharge of such debt is waived. (Emphasis added)

The amendment eliminated the phrase "or from property of the debtor" to leave no doubt that a discharge extinguishes only the *in personam* part of secured debts. *Grundy National Bank v. Johnson,* 106 B.R. 95, 97 (W. D. Va. 1989). While § 727(b) does provide for the "discharge" of "debts," Congress has limited the effect of a discharge to a debtor's personal liabilities, allowing creditors to proceed on their liens and *in rem* rights notwithstanding the discharge. Thus the question presented for review herein arises.

2. THE BANK IS A "CREDITOR."

The Bank argues that it is not a "creditor" as defined by § 101(9)(A). There, "creditor" is defined as an "entity

that has a *claim against the debtor* that arose at the time of or before the order for relief concerning the debtor. . . . " (Emphasis added) Applying the rule of construction at § 102(2), the definition would provide that a creditor is an "entity that has a [claim against property of the debtor] that arose at the time of or before the order for relief concerning the debtor. . . . " There is simply no question that the Bank has a claim against Johnson's property and, therefore, is a "creditor."

3. THE RELIEF AVAILABLE UNDER CHAPTER 7 AND CHAPTER 13 IS NOT MUTUALLY EXCLUSIVE.

The Bank takes the position that the relief afforded under Chapter 13 and Chapter 7 is mutually exclusive; however, the Bankruptcy Code indicates otherwise. Congress specifically prohibited bankruptcy relief in only a few limited situations.[2] If Congress had intended that the relief available under Chapter 13 and Chapter 7 be mutually exclusive, such a provision could easily have been enacted along with the other restrictions.

4. JOHNSON'S PLAN IS NOT CONTRARY TO OTHER PROVISIONS OF THE BANKRUPTCY CODE.

(a) The Requirements of Section 1325(a)(4) Were Satisfied.

The Bank argues that Johnson's plan is contrary to the requirements of § 1325(a)(4).[3] It states that the

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[2] See §§ 109, 523 and 727.

[3] This argument is raised here for the first time on appeal. This argument has not been raised on appeal in either the district court or the court of appeals.

bankruptcy court used Johnson's estimate of value in confirming the plan. The bankruptcy court made its determination of value after an evidentiary hearing. At that hearing, the Bank failed to provide testimony as to value,[4] but merely cross-examined Johnson's witnesses. Based on the testimony, the bankruptcy court assigned the values urged by Johnson. Under the plan, that value was to be paid the Bank with interest over five years. Thus, under the plan the Bank was to receive the present value of its collateral and, as such, the "Chapter 7 test" of § 1325(a)(4) was satisfied.

(b) Whether Or Not Johnson Proposes To Return His Property To The Bank, The Bank Has A Right To Payment.

The Bank suggests that because Johnson did not propose in his plan to return his property to the Bank, the Bank has no "right to payment" as contemplated by § 101(4). The Bank is confusing its *rights* with its treatment under the plan. The Bank, by virtue of its foreclosure judgment, has a *right* to receive Johnson's land and, therefore, has a *right* to payment. The Bank will always have a *right* to receive Johnson's land until the Bank has been paid for it. Whether or not Johnson proposed to transfer his land to the Bank in the plan does not affect the Bank's *right* to receive it and, therefore, does not affect its *right* to payment.

(c) The Requirements Of Section 1325(b)(1)(B) Were Satisfied By The Plan.

Section 1325(b)(1)(B) merely provides that if an unsecured creditor objects to a plan, the plan must

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[4] See Pet. p. App. 32.

provide for payment in full to the creditor or provide for the payment of all of the debtor's disposable income to the plan. The Bank argues that because there were no unsecured creditors in this plan, § 1325(b)(1)(B) was not satisfied.[5] Such an argument creates another restriction on Chapter 13 relief – that all Chapter 13 debtors must have unsecured debt. Section 109(e) does not so provide. Further, Johnson's plan clearly provides for the payment of all disposable income, a fact emphasized by the Bank's argument that the plan is not feasible.

(d) Johnson's Plan Does Not Improperly Extend The Automatic Stay Nor The Kansas Redemption Period.

The Bank argues that Johnson's plan improperly extended the automatic stay allowed by § 362 and the redemption period allowed by Kansas law.[6] The Bank obtained relief from the automatic stay in the Johnsons' Chapter 7 bankruptcy and proceeded with its foreclosure action. In the process, the Bank improperly bid its judgment at the foreclosure sale which resulted in the Kansas Supreme Court's order setting aside the sale and ordering that a new sale be conducted. See *Home State Bank v. Johnson*, 240 Kan. 417, 729 P.2d 1225 (1986). Under Kansas law, the redemption period does not begin until the sheriff's sale has been concluded.[7] After the foreclosure

[5] This argument is raised here for the first time on appeal. This argument has not been raised on appeal in either the district court or the court of appeals.

[6] See Kansas Statutes Annotated 60-2414.

[7] Id.

case was remanded by the Kansas Supreme Court to the Kansas trial court, the second sale was not conducted because Johnson filed the instant Chapter 13 proceeding. Thus, Johnson's redemption rights have not been extended as a result of the Chapter 13 filing because the redemption rights had not yet begun when the Chapter 13 was filed. Further, as to the extension of the automatic stay, it should be noted that the Bank obtained relief from the automatic stay after the court of appeals entered its mandate affirming the district court, but before the court of appeals withdrew its mandate pending this Court's ruling on Johnson's Petition for Writ of Certiorari. The Bank has sold Johnson's property and the redemption period is now running.

(e) Johnson Had Received His Chapter 7 Discharge Before Filing His Chapter 13 Bankruptcy.

The Bank relies on *Associates Financial Serv. Corp. vs. Cowen*, 29 B.R. 888 (Bankr. S.D. Ohio 1983) in arguing that Johnson's Chapter 13 filing was improper. However, in *Cowen, supra*, the debtors had not yet received their discharge at the time they filed their Chapter 13 bankruptcy. In *Cowen, supra*, the court stated that "[t]he 'serial' filing of a successive Chapter 13 petition may not be permitted until, at the earliest, after the granting of the discharge in the prior Chapter 7 proceeding." [Citations omitted] *Id.* at 895. Having received his Chapter 7 discharge before initiating his Chapter 13 bankruptcy, Johnson was eligible for Chapter 13 relief even under the Bank's authority.

5. THE QUESTIONS OF GOOD FAITH AND FEASIBILITY ARE NOT PROPERLY BEFORE THE COURT.

The Bank argues that the decision of the court of appeals should be affirmed on other grounds – specifically that the plan was not submitted in good faith and is not feasible. The questions of good faith and feasibility have not been ruled upon since the bankruptcy court confirmed Johnson's plan. Those questions are not fairly contained within the question presented for review upon which certiorari was granted. The Court, this term, refused to address a question raised by a party under very similar circumstances in *Air Courier Conference of America vs. American Postal Workers Union*, 59 U.S.L.W. 4140, 4142 (U.S. Feb. 26, 1991). In like fashion, the Court here should decline to decide the questions of good faith and feasibility.

The Bank relies on *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 99 Sup.Ct. 740, 58 L.Ed.2d 740 (1979). There, however, the Court determined that the issue Washington urged was not before the Court "was implicit in the subjects the parties were requested to address in our order noting probable jurisdiction of this appeal." *Id.* at 99 Sup.Ct. 749, n. 20. Here, however, the Court granted Johnson's Petition for Writ of Certiorari on a very narrowly framed issue which does not include issues on good faith or feasibility.

E. CONCLUSION

Johnson respectfully requests that the Court reverse the decision of the court below and remand the case to the district court for further proceedings on the undecided questions raised by the Bank in its appeal from the bankruptcy court.

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No. 90-693

In the Supreme Court of the United States

October Term, 1990

CURTIS REED JOHNSON,
Petitioner,

v.

HOME STATE BANK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INTEREST OF AMICI CURIAE

Amicus Consumer Education and Protective Association, Inc. (CEPA) is an organization of consumers which is dedicated to advancing the cause of consumer rights and which works in support of statutory remedies designed to alleviate the burdens faced by low and middle income consumers. CEPA considers the remedies afforded debtors under the Bankruptcy Code to be an important means of ameliorating the human costs which arise in an economic system in which business failure, with concomitant layoffs and unemployment, regularly occur. Many individuals, who suffer an interruption of reduction of their income due to circumstances beyond their control, must necessarily resort to the remedies provided by chapters 7 and 13 of the Bankruptcy Code in order to address

the burden of their debt or to reorganize their financial affairs. For many persons, chapter 13 is the only means available for setting up affordable payment plans so that they can satisfy their debts and retain the modest amount of property they have acquired -- especially their most important assets, their homes.

Amici Jeanne Browning is an individual who owns residential property encumbered by a mortgage. Browning is currently in a chapter 7 bankruptcy case, necessitated by unemployment. The mortgage on her home is in default. Should she find employment and obtain sufficient income after her chapter 7 case is completed to make it feasible to save her home through chapter 13 relief, she may wish to avail herself of that remedy.

SUMMARY OF ARGUMENT

The decision of the court below prevents a debtor who has been discharged of *in personam* liability on a mortgage debt from listing the remaining *in rem* liability as a debt in a chapter 13 bankruptcy. This decision is at variance with the plain language of the Bankruptcy Code and its legislative history. Further, the decision invents a *per se* rule of eligibility for chapter 13 relief that has no basis in the Code and is inconsistent with the purpose and policies of chapter 13. If the lower court's decision is affirmed, the availability of bankruptcy relief for consumer debtors would be severely impaired.

ARGUMENT

I. BOTH THE PLAIN LANGUAGE OF THE BANKRUPTCY CODE AND ITS LEGISLATIVE HISTORY ESTABLISH CONGRESS' INTENT TO DEFINE THE TERM "CLAIM" TO INCLUDE *IN REM* OBLIGATIONS

A. This Court's Inquiry Need Go No Further Than An Examination Of The Text Of Sections 101(4) And 102(2) Of The Bankruptcy Code

The issue in this case is whether the term "claim," as defined in the Bankruptcy Code, 11 U.S.C. §101(4),[1] encompasses a mortgage lien which encumbers a debtor's property and remains due after the debtor's

[1] Until November 1990, the Bankruptcy Code's definition of the term "claim" was codified at 11 U.S.C. §101(4). In the Crime Control Act of 1990, Pub L. No. 101-647, Congress amended section 101 of the Bankruptcy Code, 11 U.S.C. §101, to add a new subparagraph (3) and to redesignate former subparagraphs (3) through (31) as subparagraphs (4) through (32). The amendment is effective November 29, 1990 with respect to all cases filed on or after that date. Thus, for cases filed after November 29, 1990, the definition of the term "claim" is now codified at 11 U.S.C. §101(5). To avoid confusion, and because the amendment does not apply to this case, this brief will cite to the former codification of the definition, 11 U.S.C. §101(4).

in personam liability on the secured debt has been discharged in a prior bankruptcy. If such an obligation is a "claim," then a debtor may provide for payment of the obligation under the terms of a chapter 13 plan. *See* 11 U.S.C. §1322(b).

As in all cases of statutory construction, the starting point in this case must be the statutory language itself. *Pennsylvania Department of Public Welfare v. Davenport*, 110 S.Ct. 2126, 2130 (1990); *United States v. Ron Pair Enters., Inc.*, 109 S.Ct. 1026, 1030 (1989). "[T]he strong presumption [is] that Congress expresses its intent through the language it chooses." *Immigration and Naturalization Servs. v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987). Where the terms of the statute are unambiguous, only the "most extraordinary showing of contrary

intentions" from the legislative history would justify limiting the statute's plain language." Garcia v. United States, 469 U.S. 70, 75 (1984). As long as the framework of the Code is coherent and consistent, there is generally no need to look beyond the plain language. Ron Pair, 109 S.Ct. at 1030.

In this case, the language of the Code is clear, making resort to legislative history unnecessary. In the text of the statute, Congress has unambiguously expressed its intent to include in rem obligations within the scope of the definition of the term "claim."

B. Sections 101(4) and 102(2), Read Together, Unambiguously Express Congress' Intent To Include In Rem Obligations Within The Definition Of The Term "Claim"

1. 11 U.S.C. §101(4)

Section 101(4) of the Bankruptcy Code

defines the term "claim" as a:

> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
>
> (B) right to a equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

11 U.S.C. §101(4).

Under §101(4), the initial inquiry must be whether an in rem obligation gives rise to a "right to payment." Recently, this Court observed that, in enacting this definition, "Congress chose expansive language" and that to the extent the phrase "right to payment" is modified in §101(4), the modifying language "reflects Congress' broad rather than restrictive view of the class of obligations that qualify as a

'claim.'" Davenport, 110 S.Ct. at 2130. See also Ohio v. Kovacs, 469 U.S. 274, 279 (1985) (claim broadly construed to include obligation to clean up a hazardous waste disposal site).[2]

When does an obligation give rise to a right to payment? Last term in Davenport, this Court considered whether a criminal court sentence obliging an individual to make monetary restitution is a right to payment and therefore, a claim under the Bankruptcy Code. The Court held that a criminal restitution obligation is a bankruptcy claim. The Court rejected the

[2] Courts have consistently interpreted the scope of the term "claim" broadly. See, e.g., In re Remington Rand Corp., 836 F.2d 825, 829 (3d Cir. 1988) ("all possible legal obligations "); In re Robinson, 776 F.2d 30, 36 (2d Cir. 1985) ("broadest possible"), rev'd on other grounds, 479 U.S. 36 (1986); In re Baldwin-United Corp., 48 B.R. 901, 903 (Bankr. S.D. Ohio 1985) ("all encompassing"); In re Smith Jones, Inc., 26 B.R. 289, 293 (Bankr. D. Minn. 1982) ("sufficiently broad to cover any possible obligation").

argument that the definition of the term claim should be construed with reference to either the purposes of restitution or the methods of enforcement. Rather, the Court relied solely on the commonly understood meaning of the statutory phrase, concluding that "[t]he plain meaning of a 'right to payment' is nothing more than an enforceable obligation." 110 S.Ct. 2131.[3]

The reasoning employed by the Court in Davenport controls the outcome of this case. It is difficult to conceptualize how respondent's mortgage against petitioner's real property is anything other than an "enforceable obligation." If petitioner

[3] "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42 (1979); accord Mills Music, Inc. v. Snyder, 469 U.S. 153, 164 (1985); Escondido Mutual Water Co. v. La Jolla Band of Mission Indians, 466 U.S. 765, 772 (1984).

were to pay the respondent the entire sum owed on the mortgage, his obligation would be satisfied. As in Davenport, it is petitioner's failure to make a monetary payment which gives rise to the creditor's remedy. Here, respondent may enforce the payment obligation by enforcing its security interest and proceeding against the petitioner's real estate. In Davenport, the remedy was the threat of revocation of probation and possible incarceration. The only difference between this case and Davenport is the manner in which the payment obligation is enforced and that difference is immaterial for purposes of determining whether an obligation is a claim under 11 U.S.C. §101(4). Davenport, 110 S.Ct. at 2131.

This analysis is buttressed by the qualifying language of §101(4) which makes

clear that a right to payment is a claim -- regardless whether it is "secured" or "unsecured." In this case, as the term is a commonly understood, respondent holds a "secured" claim. It has a right to receive money which is secured by a security interest in the petitioner's real property. Particularly since the modifying language of §101(4) is intended to be expansive rather than limiting, there can be little doubt that the petitioner's in rem obligation in this case easily falls within the literal terms of the statute. It goes against common sense, and would certainly be a shock to secured creditors whose claims against a debtor are discharged in a chapter 7 case, to say that such creditors have no "right to payment." The intent of the "right to payment" phrase is to limit bankruptcy courts to claims which

are reducible to fixed monetary amounts. Despite the discharge of personal liability, a secured creditor still has a right to the exact amount of the debt which may be obtained from the proceeds of a foreclosure sale.

In its opinion below, the court of appeals concluded that the respondent had no right to payment against the petitioner "because Johnson's personal liability on the mortgage was discharged under Chapter 7." Petition for Cert. App. 7. The lower court's fundamental error was to focus on the nature of the remedy available to respondent in determining whether a claim exists rather than simply evaluating whether the creditor has an enforceable remedy for the petitioner's failure to make payment.

The flaw in the court of appeals'

analysis is even more apparent when one considers that the primary distinction between personal and <u>in rem</u> liability has to do with the scope of the creditor's remedy for enforcing a right to payment. When a debtor has personal liability, any property owned by the debtor is potentially subject to sale if a debtor fails to make payment and a creditor obtains a money judgment and proceeds to execute on the judgment. By comparison, where a payment obligation is <u>in rem</u> and there is no personal liability, a creditor may proceed to enforce its security interest by seeking to foreclose and sell only specified property in which the debtor has transferred a property interest to the creditor. In both situations, our legal system contemplates that a creditor may subject a debtor's property to the process

of judicial or non-judicial execution in order to satisfy an unpaid obligation. As between the debtor and the creditor, the difference between personal and in rem liability does no more than define which property owned by the debtor is subject to sale to satisfy the indebtedness. Thus, the fact that a creditor can look only to specified property, rather than all of the debtor's property, cannot possibly make the debtor's obligation to pay any less a "right to payment". In essence, the difference between personal and in rem liability has to do with the scope of the creditor's remedy; it has no bearing in as to whether the creditor has a right, in the first place, to receive payment.

2. 11-U.S.C. §102(2)

This case can be resolved solely by reference to the plain language of §101(4).

That Congress meant what it said in that section is confirmed by reference to 11 U.S.C. §102(2). Section 102(2) provides the following rule of construction for the Bankruptcy Code:

> "claim against the debtor" includes claim against property of the debtor;

Through this plain, unambiguous language, Congress has made explicit that a claim against the debtor also encompasses a claim against the debtor's property. In light of the statute's reference to a claim against property of the debtor as being "included" within the concept of a claim against the debtor, §102(2) can only be read to mean that a claim against property is a type a claim cognizable in the debtor's bankruptcy case.

Moreover, §102(2) specifically uses the phrase "claim against the property of

the debtor." If Congress had intended an _in rem_ obligation against the debtor's property to be something other than a claim, it would not have employed the defined term "claim" in enacting §102(2); Congress would have referred to a claim against the debtor as including a creditor's "rights" against a debtor's property, or some similar term.

Thus, §102(2) represents a clear expression of Congress' intent to include _in rem_ obligations within the definition of a bankruptcy claim and eliminates any possible doubt on the question. Since there is no other language elsewhere in the Code to suggest that Congress intended to limit the applicability of §102(2) to certain types of _in rem_ claims, the Court must give full expression to the plain meaning of the provision in construing

§101(4) in all cases. _See_ 11 U.S.C. §103(a).

C. Congress' Intent to Include _In Rem_ Obligations Within The Meaning Of The Term "Claim" Also Finds Clear Expression In 11 U.S.C. §502

Section 502 of the Bankruptcy Code provides that if a party files an objection to a proof of claim,

> the court . . . shall determine the amount of such claim . . . and shall allow such claim in such amount except to the extent that --
>
> (1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured . . . .

11 U.S.C. §502.

On its face, §502 demonstrates that Congress contemplated that an obligation enforceable only against the debtor's property is a bankruptcy "claim." Section 502 states that a claim shall be allowed by

the court unless it is unenforceable, under applicable law, against the debtor and his property. To be disallowed, a claim must be unenforceable against both the debtor and his property. Rephrasing this principle to positive voice, this means that if the claim is enforceable against either the debtor or his property, the claim must be allowed. Just as a creditor holding a claim only against the debtor personally has an allowable claim, so must a creditor holding a claim only against the debtor's property. Obviously, it would make no sense for Congress to provide that a claim must be allowed if enforceable against the debtor's property if an in rem obligation were not considered a claim.

Nothing in §502 or elsewhere in the Code suggests that Congress intended to limit in any way the principle that a claim

may be enforceable against property. Again, under basic principles of statutory construction, the Court should give full effect to Congess' language.

D. If The Court Looks Beyond The Plain Language Of The Statute, The Legislative History Demonstrates That Congress Intended To Take The Language Of Sections 101(4) and 102(2) From The Most Expansive Definition Of "Claim" In The Former Bankruptcy Act, A Definition Specifically Adopted To Include Claims Against Property Only

In its opinion below, the court of appeals acknowledged that the plain language of §102(2) provides that a claim against the debtor includes a claim against property of the debtor. However, the court referred to the Senate Report in the Bankruptcy Code's legislative history which states that §102(2) is intended to "cover nonrecourse loan agreements where the creditor's only rights are against the property of the debtor, and not against the

debtor personally." S. Rep. No. 95-989, 95th Cong., 2d Sess. 28 (1978). Seizing upon this language in the Senate Report, the court held, in effect, that the only in rem obligations which are bankruptcy claims are those which arise from a nonrecourse agreement and that petitioner's payment obligation to respondent, which may be enforced only against petitioner's property and not through personal liability due to the prior chapter 7 discharge, is not a bankruptcy claim. Petition for Cert. App. 5-6.

The lower court's reasoning is inconsistent with the canons of statutory construction this Court has applied in construing the Bankruptcy Code. The court of appeals limited the plain language of sections 101(4), 102(1) and 502(b) by relying on legislative history which did no

more than give an illustrative example of a claim against property of the debtor. Nothing in the committee reports or voluminous hearings suggest that there was any intent to limit the claims against property solely to those arising by agreement. In essence, the court construed a clear statute by reference to ambiguous legislative history. To the contrary, as this Court stated in Ron Pair, the plain meaning of the statute

> should be conclusive except in the "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters."

109 S.Ct. at 1031, quoting, Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).[4]

---

[4] **Where Congress has employed statutory language which is open to interpretation and which, if construed to give effect to its apparent plain (continued...)**

Thus, it was incorrect for the court of appeals to rely on a single passage from the legislative history as a basis for overriding the plain language of the statute. Further, as explained below, a more comprehensive review of the legislative history reveals that Congress fully understood that the broadest possible definition of claim enacted into the Bankruptcy Code would include claims against the property of the debtor. It is therefore not surprising that at least three authoritative commentators on the Bankruptcy Code have all agreed that the Code definition of the term "claim" encompasses the in rem mortgage obligation which survives the discharge of a debtor's personal liability in a chapter 7 case. 5 Collier on Bankruptcy ¶1322.09, at 1322-19 (15th ed. 1990); W. Drake and J. Morris, Chapter 13 Practice and Procedure 59.08, at 5-81 (supp. 1990); Norton Bankruptcy Law and Practice 574.08, at 74-46 (1990).

(...continued)
meaning, would depart from clear pre-Code bankruptcy practice and would conflict with either other Code provisions or other significant state or federal interests, this Court has held that Congress did not intend to depart from pre-Code practices. See Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986); Kelly v. Robinson, 479 U.S. 36 (1986). Here, by comparison, the applicability of the plain language of §101(4) and §102(1) to an in rem obligation is not open to interpretation and is consistent with §502(b). Moreover, the plain meaning of §101(4) and §102(2) are consistent with pre-Code practice. Most significantly, the courts had interpreted the former reorganization definition of claim under the prior Bankruptcy Act to include claims where there was no personal liability. Indeed, the leading cases did not involve non-recourse agreements. In both Herbert V. Apartments Corp. v. Mortgage Guarantee Corp., 98 F.2d 662, 666 (3d Cir. 1938), cert. denied, 305 U.S. 640 (1938) and Brooklyn Trust Co. v. R.A. Securities Holding, Inc., 134 F.2d 165 (2d Cir. 1943), the debtors had no agreement with creditors who had mortgages on their property. Rather, in both cases the debtor had purchased the property subject to the mortgage but without agreeing to assume the debt.

1. The definition of "claim" in Chapter X of the Previous Bankruptcy Act was adopted to assure that claims against property only could be included in bankruptcy proceedings

In 1938, the Chandler Act, Pub. L. No. 696, 75th Cong., 52 Stat. 883, added to the Bankruptcy Act of 1898, the predecessor to the present bankruptcy statute, definitions of "claim" for various chapters of that Act. The most expansive was that of section 106(1) for Chapter X on Corporate Reorganizations.[5]

> " 'claims' [when used for the purposes of Chapter X] shall include all claims of whatever character against a debtor **or its property**, except stock, whether or not such claims are provable under section 63 of this Act and whether secured or unsecured, liquidated or unliquidated, fixed or contingent".

§ 106(1), Bankruptcy Act of 1898, as added June 22, 1938, ch. 575 § 1, 52 Stat. 883 codified at 11 U.S.C. § 506 (1976) (emphasis added).

The definition of "claim" was added for the specific purpose of reversing earlier decisions such as In re Draco Realty Corp., 11 F.Supp 405 (S.D.N.Y. 1935), which held that creditors with claims only against a debtor's property could not bring involuntary bankruptcies. See Gerden, Corporate Reorganizations, Changes Effected by Chapter X of the Bankruptcy Act, 52 Harv. L. Rev. 1, 4 (1939). The Committee Reports on the Chandler Act explained the purpose of the

[5] The same definition was used in Chapter XII -- Real Property Arrangements by Persons Other Than Corporations. § 406(2), codified at 11 U.S.C. § 806(2) (1976). Essentially the same definition was used in Chapter IX -- Adjustment of Debts of Political Subdivisions... § 81(1), codified at 11 U.S.C. § § 401(1). Other definitions added by the Chandler Act were more restrictive. For Chapter XI-- Arrangements, the definition included only claims against the debtor. § 307(2), codified at 11 U.S.C. § 707(2) (1976). For Chapter XIII-- Wage Earner Plans, "claims" excluded claims secured by real property or "chattels real." § 606(1), codified at 11 U.S.C. § 1006(1) (1976).

new definition.

The House of Representatives' Report stated:

> The provisions dealing with the right to initiate a reorganization proceeding are uncertain...The phrase 'claims against any corporation' has been construed to exclude creditors holding claims against the property of the debtor. This is unnecessarily restrictive and should be corrected.

H.R. Rep. No. 75-1409, 75th Cong. 39 (1937), cited in Matter of Sponsor Realty Corp., 48 F.Supp 735, 738 (S.D. N.Y. 1943).

The Senate Report stated:

> The right of creditors to file petitions is restricted to creditors holding claims that are liquidated in amount and fixed in liability...These need not be claims against the debtor itself but may be claims against the property of the debtor.

S. Rep. No. 75-1916, 75th Cong. 25 (1938) (emphasis added), cited in, Sponsor Realty, 48 F.Supp at 738.

2. By 1977, it was settled law that claims in reorganizations included claims with no in personam rights

Following passage of the Chandler Act, courts consistently interpreted "claim" under Chapter X of the Bankruptcy Act to include claims against property only. In the leading case of Herbert V. Apartments Corp. v. Mortgage Guarantee Corp., 98 F.2d 662, 666 (3d Cir. 1938), cert denied, 305 U.S. 640 (1938), the debtor owned property which its successors had mortgaged without personal liability. The court held that the mortgage holders had a "claim" against the debtor which could be dealt with in the bankruptcy. Accord Brooklyn Trust Co. v. R.A. Securities Holding, Inc., 134 F.2d 165 (2d Cir. 1943); Sponsor Realty Corp.

By the time the present Act was being considered, the broad scope of the Chapter X definition was settled law. Collier on

Bankruptcy, the leading commentary on the Act stated:

> The word "claims" as defined in § 106(1) [of Chapter X of the Bankruptcy Act] is sweeping in scope. Within its purview is any character of a claim against the debtor or its property, whether or not such claim is provable under § 63 of the Act, and whether secured or unsecured, liquidated or unliquidated, fixed or contingent. This is, of course, a more inclusive definition than that applicable in ordinary bankruptcy and it should be given a broad construction with respect to claims and creditors in order to dispose of all liabilities of the debtor in reorganization.
>
> To come within the terms of § 106(1), however, it is essential that the claim in question be predicated against either the debtor or the debtor's property. But it is to be noted that a claim against the debtor's property alone is sufficient. It is not necessary that the claimant have an in personam claim against the debtor, and such a provision in the Act is clearly constitutional.

6 Collier on Bankruptcy ¶2.05 pp. 306-307

(14th ed. 1978) (citations omitted) (emphasis added).

3. The present definition of claim in sections 101(4) and 102(2) is taken from and expands on the already broad Chapter X definition

The present definition of "claim" in section 101(4) and the accompanying rule of construction in section 102(2) were adopted as part of the Bankruptcy Reform Act of 1978, Pub. L. 95-598, §§ 101(4) & 102(2), 92 Stat. 2549, 2550, 2555. The early versions of the bills which ultimately became the final 1978 Act employed a more narrow definition. See Appendix Vol. 2 Collier on Bankruptcy, "Legislative History of the New Bankruptcy Law," (15th ed. 1990) (tracing the various bills and proposals which preceded the 1978 Act).[*]

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[*] H.R. 31, the "Commission's Bill" and H.R. 32, " the "Judges' Bill" both defined "claim" as a "legally enforceable demand for performance of (continued...)

H.R. 8200 reported to the House on September 9, 1977, introduced a more sweeping definition along with the present numbering. This definition was:

> §101(4) "Claim" means -
> (A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
> (B) right to an equitable remedy for breach of performance if such breach does not give rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured;

H.R. 8200, 95th Cong. 1st Sess. reported

(...continued)
an obligation to pay money". H.R. 31 § 1-102(9), 94th Cong. 1st Sess. (1975) and H.R. 32 § 1-102(7), 94th Cong, 1st Sess. (1975), both reprinted in <u>Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary on H.R. 31 and 32</u>, 94th Cong. 1st & 2d Sess. Appendix p. 15 (1976).

September 8, 1977, <u>reprinted in</u> Appendix Vol. 3 Collier on Bankruptcy III-1,309-10 (15th ed. 1990).

This broader definition was adopted along with a "Rule of Construction" in section 102(2) which stated that "claim against the debtor" includes claim against property of the debtor." <u>Id.</u> at III- 322.

Although H.R. 8200 divided the definition into a main definition and a rule of construction, both track almost word for word the Chapter X definition of the old Section 106, but broaden it to include equitable claims and rights for breach of performance. While subsequent drafts narrows slightly the definition in section 101(4)(B),' the language of the

The final version §101(4)(B) simply incorporated a requirement that an equitable remedy must give rise to a right to payment to be a "claim."

rule of construction that a claim includes claim against the property of the debtor remained unchanged and was enacted into law.

The House Committee Report on H.R. 8200 and the Senate report on S.2266 explicitly acknowledged the reorganization sections of the prior Bankruptcy Act as the source of the new definition of claim and also emphasized that the new definition was even broader than under prior law:

> Under present law, 'claim' is not defined in straight bankruptcy. ... the term is defined in the debtor rehabilitation chapters of present law far more broadly. <u>The definition in paragraph (4) adopts an even broader definition of claim than is found in the present debtor rehabilitation chapters</u>.

H.R. Rep. No 95-595, 95th Cong. 1st Sess. 309 (1977) (emphasis added) ("House Report"); S. Rep No. 95-989, 95th Cong. 2d

Sess. 21-22 (1978) (emphasis added).

Thus, the present definition of "claim" was taken from the existing Chandler Act definition for reorganizations. That definition had been explicitly adopted in order to encompass claims where there was no <u>in personam</u> right. By 1977, the broad scope of that definition was supported by more than thirty years of settled judicial interpretation that claims included claims exclusively against property. Congress intended, by broadening the scope of the definition even further, to include within its scope at least all claims included by the Chandler Act definition, including those exclusively against property of the debtor.

Finally, where Congress did intend to limit the scope of section 102(2), it did

so explicitly. The present provisions on involuntary bankruptcy in section 303(b) adopted in 1978 along with sections 101 and 102, limit the right to bring involuntary cases to holders "of a claim against such person" (emphasis added). Thus, as Collier points out, Congress here did target a narrow exception to section 102(2) so that a creditor holding a mortgage, but not a personal claim, could not bring an involuntary petition, but would then have a "claim" once the order of relief was entered. 2 Collier on Bankruptcy ¶303.08 p.393-25 (15th ed. 1990). Had Congress intended other limitations on the scope of §102(2), there would be some evidence of that intent and Congress would have explicitly incorporated the limitation in the statute.

II. THE *PER SE* RULE ADOPTED BY THE COURT OF APPEALS EXCLUDING ALL NONRECOURSE MORTGAGES FROM CHAPTER 13 RELIEF IS INCONSISTENT WITH THE PURPOSES AND POLICIES OF THE CODE AND IS NOT NECESSARY TO CORRECT ABUSES OF THE BANKRUPTCY SYSTEM

A. Introduction

In the courts below, respondent Bank has suggested that Johnson's utilization of a chapter 13 bankruptcy to save his farm is somehow an abuse of the bankruptcy system. It is presumed that respondent will again raise this issue before this Court.

For the reasons discussed in the sections above and in petitioner's brief, Johnson's use of chapter 13 is perfectly proper. Although the Code sets forth certain provisions regarding eligibility or disqualification for bankruptcy relief, nowhere does it prohibit the use of chapter 13 to pay a residential mortgage obligation where personal liability has been

discharged. However, even if there is a legitimate question as to the propriety of Johnson's filing, the Bankruptcy Code provides the bankruptcy court with ample tools to prevent abuse of the bankruptcy system.

B. The Purpose And Policies Of Chapter 13

The two principal purposes of bankruptcy are to provide equity among creditors and a fresh start for the debtor. The fresh start purpose is designed to allow individuals who have become mired in debt to free themselves from that burden and engage in newly productive lives unhampered by the pressure and discouragement of preexisting debt. E.g., Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934). The goal of equity among creditors is achieved by the fair distribution of the debtor's assets according to established

rules, set forth in the Code, which guarantee similar treatment to similarly situated creditors. See e.g., House Report at 117-78.

In substantially revising chapter 13 of the Bankruptcy Code in 1978, Congress clearly expressed its intent to make consumer debtor rehabilitation payment plans an attractive and flexible alternative to the straight liquidation of chapter 7 and to address the problems which had caused former Chapter XIII to be under-utilized under the Act. See House Report at 116-118. As in the other Code chapters, under chapter 13, Congress sought to accommodate fairly both debtors and creditors and to achieve a balance of the competing interests which arise in bankruptcy cases. House Report at 118. See also 5 Collier on Bankruptcy ¶1300.02

(15th ed. 1990). The applicable Code provisions accord significant rights to both debtors and creditors. The creation of such a delicately balanced system obviates the need for the ironclad <u>per se</u> rule urged by respondent - a holding that would exclude entirely an important class of monetary obligations (residential mortgages where there is no personal liability) from the comprehensive system of administering debts found in chapter 13.

When this system is examined closely, it is apparent that the Code either accommodates or rejects the concerns of the respondent that petitioner's chapter 13 filing is an abuse of the bankruptcy system. What chapter 13 provides is the opportunity for an individual to propose a financial rehabilitation plan which will provide for payment of a secured creditor's

claim and, in many cases, save the debtor's home.

C. The Code Provides Ample Tools To Prevent Alleged Abuse

1. The Code contains <u>per se</u> rules where Congress found them necessary

Where Congress has found it necessary to include express proscriptions on debtors, it has done so. The Code contains several <u>per se</u> rules regarding eligibility for bankruptcy relief.

a. 11 U.S.C. §109(e)

Section 109(e) of the Code sets forth the standards of eligibility for chapter 13 relief. The section states:

> (e) Only an individual with regular income that owes, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts of less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000, or an individual with regular income and such individual's spouse, except a stockbroker or a commodity

broker, that owe, on the date of the filing of the petition, noncontingent, liquidated, unsecured debts that aggregate less than $100,000 and noncontingent, liquidated, secured debts of less than $350,000 may be a debtor under chapter 13 of this title

The eligibility criteria in §109(e) are specific and restrictive. The limitations on amount of debt were intended to insure that chapter 13 can only be used by those for whom it was designed. The underlying purpose of the section was to establish the dollar limitations on indebtedness that an individual with regular income can incur and yet file under chapter 13. S. Rep. No. 989, 95th Cong., 2d Sess 31 (1978). <u>See</u> 2 <u>Collier on Bankruptcy</u> ¶109.05 (15th ed. 1990).

Section 109(e) sets forth clearly delineated standards of eligibility for chapter 13. There is no provision for the

judicial exercise of discretion. If the court finds that a debtor fails to meet those standards, chapter 13 relief may be denied upon motion of any party in interest. <u>In re Fostvedt</u>, 823 F.2d 305 (9th Cir. 1987).

b. 11 U.S.C. §109(g)

Congress added another <u>per se</u> rule of ineligibility for bankruptcy relief to §109 in 1984 when it acted to rectify the perceived abuse of multiple bankruptcy filings. The additional provision, §109(g), states as follows:

> (g) Notwithstanding any other provision of this section, no individual or family farmer may be a debtor under this title who has been a debtor in a case pending under this title at any time in the preceding 180 days if -
>
> (1) the case was dismissed by the court for willful failure of the debtor to abide by orders of the court, or to appear before the court in proper prosecution of

the case; or

(2) the debtor requested and obtained the voluntary dismissal of the case following the filing of a request for relief from the automatic stay provided by section 362 of this title.

Prior to the enactment of §109(g), some debtors had been using tactics that could be deemed abusive. Such an issue would arise, for example, where a debtor, after the dismissal of an earlier case, filed a second bankruptcy on the eve of foreclosure solely to re-invoke the benefits of the automatic stay, 11 U.S.C. §362(a), and without any legitimate reorganization purpose. See 5 Collier on Bankruptcy ¶1300.12 at 1300-49. Prior to 1984, the propriety of the second filing would have been evaluated in the context of the requirement of good faith. 11 U.S.C. §1325(a)(3). In re Johnson, 708 F.2d 865, 868 (2d Cir. 1983).

Now, with §109(g), Congress has specified the point at which repetitive filings automatically become an abuse of the bankruptcy system." Section 109(g) only applies when the particular circumstances described therein are present.

In the case before this Court, Johnson's earlier chapter 7 case had been terminated almost two years before he filed the chapter 13 case. Furthermore, the chapter 7 case had proceeded to discharge and had been closed; it had not been dismissed under any of the circumstances delineated in §109(g). Applying the benchmark established by Congress in

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In re March, 83 B.R. 270, 274 (Bankr. E.D.Pa. 1988) ("The existence of section 109(g) provides congressional guidance on the circumstances under which repetitive filings are inappropriate and thus limits the need for the court to examine repetitive filings under the rubric of good faith.").

§109(g), then the second filing was not *per se* improper.[*] To the extent, if any, that the second filing raised a question of good faith, that was an issue for the bankruptcy court to resolve.

c. 11 U.S.C. §727(a)(8), (9)

Section 727 of the Code is yet another area where Congress has implemented a bright line rule on eligibility for bankruptcy relief. This section sets forth a number of requirements for the granting of a chapter 7 discharge, and provides in

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[*] This is not to say that repetitive filings, even if not fitting within the parameters of §109(g), may not constitute evidence of lack of good faith to the extent that they reflect the debtor's intent to misuse the relief available under the Code. *See* *In re Penz*, 121 B.R. 602 (Bankr. E.D.Okl. 1990) (four serial filings were in bad faith and warranted dismissed with prejudice to refiling for 180 days); *In re Kinney*, 51 B.R. 840 (Bankr. C.D.Ca. 1985) (ten filings by different members of one family solely to utilize automatic stay without intent or ability to effectively reorganize constituted bad faith; monetary sanctions imposed on attorney).

pertinent part as follows:

> (a) the court shall grant the debtor a discharge, unless -
>
> . . .
>
> (8) the debtor has been granted a discharge under this section, under section 1141 of this title, or under section 14, 371, or 476 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition;
>
> (9) the debtor has been granted a discharge under section 1228 or 1328 of this title, or under section 660 or 661 of the Bankruptcy Act, in a case commenced within six years before the date of the filing of the petition, unless payments under the plan in such case totaled at least -
>
> (A) 100 percent of the allowed secured claims in such case; or
>
> (B)(i) 70 percent of such claims; and
>
> (ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort; ...

Thus, §727(a)(8) and (9) establish a *per se* rule governing how often a debtor

can obtain the benefits of the chapter 7 discharge. Such a discharge cannot be granted if a previous chapter 7 discharge was obtained in a case commenced within the previous six years or if a chapter 13 discharge was obtained in the same time frame where the chapter 13 plan paid less than 70% of the allowed secured claims. See generally, In re Marshall, 74 B.R. 185 (Bankr. N.D.N.Y. 1987); Matter of Bishop, 74 B.R. 677 (Bankr. M.D.Ga. 1987).

2. The Code enables courts to exercise discretion where necessary to prevent abuse

In addition to the statutory *per se* rules that limit debtor conduct as discussed above, the Code also contains more general provisions that require the exercise of judicial discretion to prevent abuse of the bankruptcy system.

a. 11 U.S.C. §1325(a)(3)

Perhaps the most important protection against abuse of the Bankruptcy Code in chapter 13 cases is the bankruptcy court's power to deny confirmation of a plan which has not been proposed "in good faith." 11 U.S.C. §1325(a)(3).

In one of the earliest cases construing §1325(a)(3), Judge William L. Norton, Jr., a respected authority on the Code,[illegible] analyzed this provision and concluded as follows:

> Two elements seem inherent in "good faith" with respect to the debtor's responsibility in proposing a plan, to wit: (a) honesty in purpose and (2) full disclosure of relevant facts.
>
> . . .
>
> Thus, good faith as used in section 1325(a)(3) means full and complete disclosure and honesty

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[illegible] See Norton Bankruptcy Law and Practice (1990).

> of purpose by the debtor to consummate the payments proposed in the plan.

In re Wiggles, 7 B.R. 373, 380 (Bankr. N.D.Ga. 1980). See also Barnes v. Whelan, 689 F.2d 193, 198 (D.C. Cir. 1982) (good faith refers to "debtor misconduct in the implementation or approval of the plan, and did not relate to the contents of the plan.") (emphasis in original).

The courts of appeals have outlined a list of factors which bankruptcy courts should consider in determining whether a chapter 13 plan has been proposed in good faith. The widely accepted view is that only where there has been a showing of serious debtor misconduct or abuse should a chapter 13 plan be found lacking in good

E.g., In re LeMaire, 883 F.2d 1373 (8th Cir. 1989); In re Smith, 848 F.2d 813 (7th Cir. 1988).

faith. Courts have not hesitated to deny confirmations of plan which did not satisfy the good faith requirement.

In the bankruptcy court below, respondent Bank availed itself of its right to file an objection to confirmation of Johnson's chapter 13 plan. See Bankr. Rule 3020(b). The bankruptcy court carefully reviewed the objection and found no basis for concluding that the plan was not proposed in good faith. In re Johnson, No. 87-10585 (Bankr. D.Kan. 1988) (slip op. at 13). Neither the district court nor the court of appeals reached the issue. However, should this matter be remanded for a determination of good faith, the

Education Assistance Corp. v. Zellner, 827 F.2d 1222, 1227 (8th Cir. 1987). See 5 Collier on Bankruptcy ¶1325.04[3] (15th ed. 1990).

In re Waldron, 785 F.2d 936 (11th Cir. 1986); In re Chinichian, 784 F.2d 1440 (9th Cir. 1986).

bankruptcy court's finding would be subject to review under the clearly erroneous standard. In re Herd, 840 F.2d 757 (10th Cir. 1988).

Indeed, the two courts of appeals which have addressed the legality of following a chapter 7 bankruptcy with a chapter 13 case have done so within the context of the good faith requirement. In re Saylors, 869 F.2d 1434 (11th Cir. 1989); In re Metz, 820 F.2d 1495 (9th Cir. 1987). In both cases, the courts sustained the evidentiary findings that the chapter 13 plans were proposed in good faith. Saylors, 869 F.2d at 1438; Metz, 820 F.2d at 1498-1499.

b. 11 U.S.C. §105(a)

The Code states that bankruptcy courts may "issue any order, process or judgment that is necessary or appropriate to carry

out the provisions" of Title 11. 11 U.S.C. §105(a). The bankruptcy court is specifically empowered to prevent abuse of process *sua sponte*. *Id.* As this Court has recently recognized, this provision of the Code is consistent with

> "the traditional understanding that bankruptcy courts, as courts of equity, have broad authority to modify creditor-debtor relationships."

U.S. v. Energy Resources Co., Inc., 110 S.Ct. 2139, 2142 (1990) (citations omitted).

Section 105(a), with its grant of general equitable powers, may be used to remedy any abuse of the bankruptcy process which a debtor might attempt to commit, as long as those powers are exercised within the confines of the Code. Norwest Bank Worthington v. Ahlers, 485 U.S. 197 (1988); Official Comm. of Equity Sec. Holders v.

Mabey, 832 F.2d 299, 302 (4th Cir. 1987). Thus, §105(a) provides an additional ground for the exercise of judicial discretion to sanction a debtor's abuse of the bankruptcy process and effectuate the purposes of the more specific proscriptions on debtor misconduct contained in the Code, where such action may be necessary.

In short, where Congress has found it necessary to legislate specific per se limitations on debtor eligibility for relief under the Code, it has done so. If Congress had wanted to prohibit a debtor from filing a chapter 13 bankruptcy to pay a mortgage where there is no personal liability for the debt, Congress would certainly have included that prohibition in the Code. The fact that Congress did not do so must mean that Johnson's attempt to use chapter 13 to save his farm is not per

se inappropriate.

However, should Johnson's chapter 13 filing raise a legitimate issue of good faith, as respondent argues that it does, then that is a question for the bankruptcy court to decide in the first instance. If necessary, this case can be remanded on that issue. But perceived abuse cannot be remedied by a strained reading of the Code which pronounces that Johnson and innumerable other debtors can never use chapter 13 to pay claims against their properties.

III. THE RULE ADOPTED BY THE COURT BELOW WOULD SEVERELY IMPAIR THE AVAILABILITY OF BANKRUPTCY RELIEF FOR CONSUMER DEBTORS IN BOTH CHAPTER 13 AND CHAPTER 7 CASES

One of the most common and important reasons for the filing of chapter 13 bankruptcy cases by consumer debtors is the desire to save a family's home, usually

through curing a mortgage delinquency pursuant to section 1322(b)(5) of the Bankruptcy Code. A decision by this Court affirming the decision of the Court of Appeals in this case would render chapter 13 unavailable to a large number of families who need its relief in order to save their homes, and would also deter the filing of chapter 7 cases by homeowners needing a bankruptcy fresh start.

The frequent use of chapter 13 to save families' homes has been noted both by courts and commentators. For example, in Matter of Brunson, 87 B.R. 304, 307 (Bankr. D.N.J. 1988) the court noted that 70% to 80% of the chapter 13 cases filed in New Jersey represented debtors' attempts to save their homes. The intent of Congress to make chapter 13 available for the curing of home mortgages is described in Collier on

Bankruptcy 1322.09[2] as well as the fact that "its most common use by far is to cure defaults on residential mortgages."1322.09[1]. Norton Bankruptcy Law and Practice §§74.08 describes section 1322(b)(5) as "much used by chapter 13 debtors to cure defaults and reinstate home mortgages that are in default on the date of the petition." A recent comprehensive study of bankruptcy debtors concluded its discussion of homeowners in bankruptcy by stating "[t]he picture of homeowners in bankruptcy is one of people struggling to keep their homes." Sullivan, Warren and Westbrook, As We Forgive Our Debtors 143 (1989) (hereinafter "Sullivan").

The holding of the court below would deny the use of chapter 13 for this purpose to all debtors who were not personally liable on the mortgages on their homes,

going far beyond simply the class of debtors who had previously filed chapter 7 bankruptcy cases. In the experience of the writers of this brief, many other homeowners have no personal liability to the holders of mortgages on their homes.

For example, a child who inherits a family home from a parent who passes away rarely formally assumes the mortgage which encumbers that property. Typically, the home remains in the family as the residence of the child and often grandchildren. However, the original mortgage and note, signed only by the deceased parent, may fall into default, either during the financial disarray which ensues upon the parent's death or at some time thereafter.

Similarly, a divorcing spouse who, through equitable distribution, obtains title to a home that was formerly in the

name of the other spouse typically never becomes obligated on an existing mortgage. A major factor in bringing about such title transfers is the presumption, under many equitable distribution statutes, in favor of awarding the family home, or at least a possessory interest therein, to the spouse (usually the wife) who will have custody of the couple's children. Again, the financial dislocation connected with a divorce and the couple's sudden need to support two households rather than one may leave a mortgage in default, or the spouse who acquires title or some lesser interest may have financial difficulties causing a default at some later time.

In many community property states, community property belonging to both spouses is liable for debts incurred by either spouse. This liability can follow

the property even after a divorce, creating another situation where a debtor's home may liable for a debt even though the debtor has no personal liability. See Britt v. Damson, 334 F.2d 896 (9th Cir. 1964); In re Chenich, 87 B.R. 101 (Bankr.9th Cir. 1988). Still other examples are the grandmother who gives a mortgage on her home to secure a grandchild's purchase of a used car or the spouse who signs a mortgage to secure a loan to the other spouse's business.

In all of these situations, chapter 13 relief would be denied by the ruling below because the debtors had no personal liability to the holder of the mortgage. The purpose of Congress to provide effective bankruptcy relief to these families would be thwarted, despite the total absence of any provision in the Code dictating that result.

Moreover, the holding of the court below would also greatly deter the filing of chapter 7 bankruptcy cases by homeowners. Studies have consistently showed that a large number of homeowners file chapter 7 bankruptcy cases. Sullivan supra, at 139; Shuchman, The Average Bankrupt: A Description and Analysis of 753 Personal Bankruptcy Filings in Nine States, 88 Commercial L.J. 288, 302 (1983). Whether because their mortgage is the one debt they faithfully paid when they could pay no others or because the discharge of other debts in chapter 7 allows them to catch up on delinquent mortgage payments without the additional complexity and expense of chapter 13, many homeowners are able to obtain their bankruptcy fresh start through chapter 7.

These debtors would certainly have to

think twice about utilizing chapter 7 relief if they knew that they were forever giving up their right to later save their homes from foreclosure in chapter 13, not just soon after their chapter 7 cases, or within six years after the chapter 7 cases, but at anytime during the twenty to thirty year terms of their mortgage loans. Worse yet, many debtors would probably file chapter 7 cases unaware that they were waiving this important right, perhaps only to find out years later when they were in desperate need of it. In either case, the availability of chapter 7 to provide a true fresh start to hard-pressed families and individuals is greatly impaired.

Nor is it of any solace that a debtor may sometimes reaffirm a debt after bankruptcy thereby maintaining a personal liability. A reaffirmation is effectuated

only by an agreement between the debtor and the creditor. A debtor may not unilaterally create a reaffirmation agreement. Matter of Vinson, 5 B.R. 32 (Bankr.N.D.Ga. 1980). If mortgage lenders become aware that chapter 7 debtors will be unable ever to file chapter 13 cases dealing with their loans if they do not reaffirm, there are likely to be few mortgage lenders who will have any incentive to agree to reaffirmations. It is the experience of the writers of this brief that in fact mortgage lenders virtually never pursue deficiency judgments, so that the personal liability obtained through a reaffirmation is essentially worthless to them.

In any case, it is hard to believe that Congress could have intended to place in the hands of mortgage lenders the right

to determine whether their borrowers who filed chapter 7 bankruptcy cases would ever be able to use chapter 13 with respect to their mortgages. As discussed elsewhere in this brief, nothing in the plain language or legislative history even suggests such a result, which is at odds with the basic purposes intended by Congress for chapter 13 bankruptcy cases.

It has often been said that hard cases make bad law. The Court should be aware that the debtor in this case has little in common with most consumer debtors who would use chapter 13. The typical consumer bankruptcy debtor does not have income from oil and gas leases or other income to make plan payments of $35,000 a year, and never had mortgage debts of close to $300,000. The median income of bankruptcy debtors is only about two-thirds of the national

median income and the median mortgage debt of bankruptcy debtors in 1981 was under $24,000. Sullivan supra at 64-69.

It may well be that, because of the proposed $80,000 balloon payment at the conclusion of the plan, or for other reasons, the debtor's plan in this case is not feasible. 11 U.S.C. §§1325(a)(6). See Collier on Bankruptcy 1325.07; Matter of Brunson, supra (plan calling for large balloon payment at conclusion of plan not feasible). It may also be that the plan was not proposed in good faith. These issues may be dealt with on remand from this court. However, the decision of the court below, which would close the courthouse door to large numbers of debtors needing chapter 13 relief, should be reversed.

IV. CONCLUSION

For the foregoing reasons, amici curiae request this Court to reverse the judgment of the court of appeals.

Respectfully submitted,

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(8)

No. 90-693

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CURTIS REED JOHNSON,
Petitioner,

vs.

HOME STATE BANK,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF AMICUS CURIAE THE KANSAS BANKERS ASSOCIATION IN SUPPORT OF THE POSITION OF RESPONDENT HOME STATE BANK

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INTEREST OF AMICUS CURIAE

The Kansas Bankers Association is a trade association having as its members substantially all of the commercial banks having their principal place of business in the State of Kansas. All Kansas banks have a significant interest in a balanced construction of the Bankruptcy Code consistent with Congressional intent.

This specific case arose from a rural bank's extension of agricultural credit secured by a mortgage of farm property. Many Kansas banks have a substantial portion of their loan portfolios in such agricultural lending, and continued financing of small agricultural operators will be promoted by a clear delineation of the extent to which successive bankruptcy petitions can be utilized to bar foreclosure. The Tenth Circuit's analysis correctly protects the right of agricultural lenders to foreclose on real property following a farmer's discharge in a Chapter 7 proceeding, notwithstanding the filing of a subsequent Chapter 13 proceeding. The Kansas Bankers Association therefore urges that either the Tenth Circuit's analysis be affirmed by this Court or an alternative, objective standard be adopted under the good faith criteria of 11 U.S.C. §1325(a)(3)[1] which bars use of Chapter 13 following discharge under Chapter 7 to frustrate a lender's sale of mortgaged real property.

SUMMARY OF ARGUMENT

The Tenth Circuit found that Congress did not intend to permit a Chapter 13 proceeding to be used to reschedule the payment of an in rem remedy where the debtor's obligation had been previously discharged in a

[1]11 U.S.C. §1325(a)(3) provides:

> (a) Except as provided in subsection (b) the court shall confirm a plan if--
>
> ***
>
> (3) the plan has been proposed in good faith and not by any means forbidden by law; . . .

Chapter 7 proceeding.[2] The Court construed the Code definitions to preclude use of Chapter 13 for this purpose as a matter of law. Respondent, The Home State Bank, in its brief to this Court, thoroughly examines these issues of Code construction. Amicus Curiae submits that in the event this Court disagrees with the Tenth Circuit's construction of the Code, the result of the Tenth Circuit should be affirmed under an alternative rationale. The good faith criteria of 11 U.S.C. §1325(a)(3) provides the vehicle for doing so. Amicus urges adoption of a per se standard of bad faith which prohibits Chapter 13 plans which propose to adjust only in rem "debts" which were discharged in a prior Chapter 7 proceeding, where there has been no intervening substantial change in circumstances between the filing of the Chapter 7 case and the subsequent Chapter 13 petition.

ARGUMENT

This case presents the court with an opportunity to review what has become known as a "Chapter 20" case.[3] In such cases, the claims which are involved in the Chapter 13 case, which is filed subsequent to discharge in a Chapter 7, are only those the debtor has incurred after the start of the original Chapter 7 and any claims which were not discharged in the Chapter 7, together with any liens which survived the Chapter 7 discharge.[4] The two most common motives for such serial filings are to achieve a continuing

[2]Petition for Cert. App. 5.

[3]Morris, *Serial Bankruptcies and Good Faith in Chapter 20*, 1 Falkner and Gray Bankr. L. Rev. 48 (1990).

[4]*Id.*, at 48-49.

reimposition of the automatic stay to bar foreclosure of liens remaining after Chapter 7 discharge and to discharge, after nominal payments in the Chapter 13 plan, a debt which was nondischargeable in the prior Chapter 7.[5] Frequently the real property which the Chapter 13 debtor seeks to protect from foreclosure sale is his or her home.[6] This case presents a somewhat less common but similar situation where the debts to be dealt with by the Chapter 13 plan are liens on non-residential real estate which because of the prior Chapter 7 discharge are in rem remedies only.

The Bankruptcy Code restraints upon successive filings are minimal. The only code section directly addressing the issue is Section 109(g), which was added to the Code in 1984.[7] It prohibits an individual or a family farmer from refiling bankruptcy within 180 days of the dismissal of a prior proceeding which was dismissed by the Court for willful failure of the debtor to abide by orders or to appear in the case or where the debtor requested and obtained a voluntary dismissal following the filing of a request for relief from automatic stay. "The rationale underlying Section 109(g) is that debtors should not be permitted to disrupt the court's processing of bankruptcy cases."[8] Other less direct restraints against multiple relief under the

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[5] *In re Russo*, 94 B.R. 127, 128 (Bankr. N.D. Ill. 1988).

[6] *See e.g., In re Metz*, 67 B.R. 462 (9th Cir. BAP 1986); *In re Ligon*, 97 B.R. 398 (Bankr.N.D.Ill. 1989).

[7] Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. 98-353, 98 Stat. 352, Title III, Section 301 (1984).

[8] Morris, *Substantive Consumer Bankruptcy Reform in the Bankruptcy Amendments Act of 1984*, 27 Wm & Mary L. Rev. 91, 101 (1985).

Code include Section 727(a)(8), which prevents a debtor from obtaining a Chapter 7 discharge more than once every six years, and Section 727(a)(9), which precludes a debtor from obtaining a Chapter 7 discharge within six years of a Chapter 12 or Chapter 13 discharge, except under limited circumstances.

Collectively, the foregoing Code provisions do not address in a comprehensive manner the problem posed by multiple filings. This has led one court to conclude, "It is fair to surmise that Congress did not anticipate the problem, therefore few statutory restraints exist in the Code."[9]

Absent an express Code prohibition of Chapter 20 cases, courts have turned to the good faith provision of 11 U.S.C. §1325(a)(3) as a means to monitor whether successive filings are abusive.[10] Although the criteria of 1325(a)(3) that a Chapter 13 plan be "proposed in good faith" is of fundamental importance, the term "good faith" is not defined in either the Code or its legislative history. Likewise, the issue has not been addressed by this Court.

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[9] *In re Russo*, 94 B.R. 127, 128 (Bankr. N.D. Ill. 1988).

[10] *E.g. Matter of Metz*, 820 F.2d 1495 (9th Cir. 1987) (Chapter 20). *See also In re Chisum*, 847 F.2d 597 (9th Cir. 1988) (Chapter 7 following three Chapter 13 petitions); and *In re Penz*, 121 B.R. 602 (Bankr. E.D. Olka. 1990) (bad faith filing of Chapter 12 after three prior Chapter 12 and Chapter 7 petitions).

Courts generally apply a multiple factor test[11] which evaluates the totality of the circumstances on a case by case basis.[12]

The good faith criteria provides a broad equitable vehicle by which Congress provided the bankruptcy courts with a "discretionary means to preserve the bankruptcy process for its intended purpose."[13] The good faith standard stands as a means to police the "manipulation of the bankruptcy system."[14] "To answer the question of good faith or lack thereof, the Court is ultimately required to determine whether or not there has been an abuse of the provisions, purpose, or spirit of Chapter 13."[15] Any plan inconsistent with the purpose of Chapter 13 is proposed in bad faith.[16]

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[11]A frequently cited list of factors is enumerated in *In re Estus*, 695 F.2d 311 (8th Cir. 1982).

[12]*E.g. Deans v. O'Donnell*, 692 F.2d 968 (4th Cir. 1982); *In re Caldwell*, 895 F.2d 1123 (6th Cir. 1990); *Matter of Smith*, 848 F.2d 813 (7th Cir. 1988); *In re LeMaire*, 898 F.2d 1346 (8th Cir. 1990); *In re Chisum*, 847 F.2d 597 (9th Cir. 1988); *In re Rasmussen*, 888 F.2d 703 (10th Cir. 1989); and *In re Kitchens*, 702 F.2d 885 (11th Cir. 1983).

[13]*In re Waldron*, 785 F.2d 936, 941 (11th Cir. 1986).

[14]*In re Rasmussen*, 888 F.2d 703, 706 (10th Cir. 1989). *See also Neufeld v. Freeman*, 794 F.2d 149, 152-53 (4th Cir. 1986).

[15]*Matter of Jones*, 119 B.R. 996, 1002 (Bankr. N.D. Ind. 1990) citing *Matter of Smith*, 848 F.2d 813, 818 (7th Cir. 1988).

[16]Roszkowski, *Good Faith and Chapter 13*, 46 Bus. Law. 67, 80 (1990).

"The purpose of chapter 13 is to enable an individual, under court supervision and protection, to develop and perform under a plan for the repayment of his debts over an extended period of time."[17]

> . . . The new chapter 13 will permit almost any individual with regular income to propose and have approved a reasonable plan for debt repayment based upon that individual's exact circumstances. As in current law, 100% payment plans will be encouraged by the limitation on availability of a subsequent discharge in section 727(a)(8). This kind of plan has provided great self-satisfaction and pride to those debtors who complete them and at the same time effect a maximum return to creditors. The limitation of §727(a)(8) will also provide a slight break on the wholesale filings of Chapter 13's by small businessmen who wish to avoid some of the restrictions of Chapter 11. It is also necessary to prevent Chapter 13 plans from turning into mere offers of composition plans under which payments would equal only the nonexempt assets of the debtor.[18]

The legislative history reflects congressional intent that an eligible debtor is to choose between Chapter 13 and Chapter 7. The House report states, "[T]he benefit to the debtor of developing a plan of repayment under Chapter 13, *rather than opting for liquidation under Chapter 7*, is that

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[17]H. R. 595, 95th Cong., 1st Sess. 118 (1977).

[18]S. Rep. No. 989, 95th Cong., 2d Sess. 13 (1978).

it permits the debtor to protect his assets."[19] Chapter 13, both under the Bankruptcy Act and the Code, was viewed as a means to "permit an individual to pay his debts and *avoid* bankruptcy by making periodic payments."[20] When an individual files a Chapter 7 liquidation proceeding, that individual is using the Bankruptcy Code for a purpose different from that contemplated by Chapter 13.

> Some consumer debtors are unable to avail themselves of the relief provided under Chapter 13. For these debtors, straight bankruptcy is the only remedy that will enable them to get out from under the debilitating effects of too much debt. The purpose of straight bankruptcy for them is to obtain a fresh start, free from creditor harassment and free from the worries and pressures of too much debt.. . .[21]

Congress provided a system of exemption,[22] redemption,[23] and reaffirmation[24] provisions by which debtors in a Chapter 7 are able to retain certain assets. Apart from assets protected by the debtor through these

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[19]H. Rep. No. 595, 95th Cong., 1st Sess. 118 (1977) (emphasis supplied).

[20]S. Rep. No. 989, 95th Cong., 2d Sess. 12 (1978) (emphasis supplied).

[21]H. R. Rep. No. 595, 95th Cong., 1st Sess. 125 (1977).

[22]11 U.S.C. §522 (Supp. IV 1986)

[23]11 U.S.C. §722 (1982)

[24]11 U.S.C. §524(c) (Supp. IV 1986)

provisions, it is the scheme of the Code that Chapter 7 debtors will generally not retain pre-bankruptcy assets.[25]

There is no legislative history indicating that Congress intended debtors to achieve the unique set of benefits resulting from a Chapter 20. It has been suggested that if Congress intended such a combination of relief, it would have expressly so provided.[26] Chapter 7 and Chapter 13 are separately crafted legislative schemes having different purposes. The legislative history cited above evidences intent that a debtor is entitled to relief under one chapter only.

Through use of a Chapter 20 proceeding, debtor Curtis Reed Johnson has attempted to retain possession of his agricultural land even though in the Chapter 7 proceeding the bank was granted relief from stay to foreclose its lien, and the debt which was secured by the mortgage on that property was discharged in the Chapter 7 case. The method which he has elected to attempt to do this is not a reaffirmation agreement, as contemplated by Chapter 7, and to which the bank would have been required to consent.[27] Rather Johnson filed a Chapter 13 petition subsequent to his Chapter 7 discharge and proposed a plan in which the in rem remedy which survived the Chapter 7 is to be paid through the terms of the plan. If not prohibited from doing so by judicial construction of either the Code definitions or the good faith standard of 11 U.S.C. 1325(a)(3), this restructuring can be imposed upon the Bank notwithstanding its objection, depriving the creditor of its contractual right to foreclose the lien.

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[25]11 U.S.C. §726 (1982)

[26]*In re Silva*, 82 B.R. 845, 847 (Bankr. S.D. Ohio 1987).

[27]11 U.S.C. §524(c) (Supp. IV 1986)

Clearly the sole purpose of debtor Johnson in filing the Chapter 13 proceeding was to manipulate the Bankruptcy Code to avoid a pending sale of his agricultural land. The Chapter 13 plan deals with no claims other than those of two creditors who have liens on the debtor's property which survived the Chapter 7 proceeding. There has been no material change in the debtor's financial affairs between the filing of the Chapter 7 and the filing of the Chapter 13. Petitioner Johnson's Chapter 20 proceeding is a patent abuse of the purpose and spirit of Chapter 13.

The courts generally hold that successive filings alone do not constitute bad faith.[28] Amicus submits that bad faith should follow as a matter of law, however, where the only debts which will be included in the Chapter 13 plan were either nondischargeable in the Chapter 7 or constitute liens upon the debtor's property subsequent to a Chapter 7 discharge, absent a substantial improvement in the debtor's financial circumstances. The use of Chapter 13 under such circumstances is clearly an abuse of the intended purpose of the Bankruptcy Code. One commentator states:

> One striking fact emerges from the foregoing examination of Chapter 13 plans filed on the heels of Chapter 7 liquidations--*all* such plans patently evidence an abuse of the purpose and spirit of Chapter 13. Clearly the sole purpose in filing such plans is to manipulate the Bankruptcy Code to avoid paying creditors. To the extent any *legitimate* reason exists for a successive filing, that reason should be readily apparent to the court. However, under the typical scenarios outlined above, courts should have little difficulty finding that virtually any Chapter 13 plan filed within six years of a Chapter 7 liquidation violates the good faith requirement.
>
> This result should obtain despite the lack of effective specific statutory provisions limiting abusive multiple filings. Courts have recognized that the Bankruptcy Code envisions alternative, rather than cumulative or successive relief, and courts should require debtors to accept the consequences of an election between bankruptcy liquidation under Chapter 7 and rehabilitation under Chapter 13. . .[29]

[28]*E.g. In re Rasmussen*, 888 F.2d at 704.

Good faith analysis under 11 U.S.C. §1325(a)(3) has been dispositive in several recent Chapter 20 cases. The Eleventh Circuit in *In re Saylors*[30] held that a Chapter 13 plan which cured arrearages on a home mortgage was proposed in good faith, even though the underlying mortgage debt had been discharged in a prior Chapter 7 proceeding. When reversing the district court, and reinstating the bankruptcy court's finding of good faith, the court relied primarily upon the bankrupt's increase in monthly income between the filing of his Chapter 7 petition and his Chapter 13 petition. Likewise, the 9th Circuit has identified changes in monthly income between the filing of a Chapter 7 and the filing of the Chapter 13 petition as a "bona fide change in circumstances" which should be examined by the bankruptcy judge to determine

[29]Roszkowski, *Good Faith and Chapter 13*, 46 Bus. Law. at 94-95.

[30]869 F.2d 1434 (11th Cir. 1989).

whether successive filings are proper.[31] In contrast, a Chapter 13 plan proposing reduced payment of debt held nondischargeable in a prior Chapter 7 was rejected as being in bad faith by the Tenth Circuit.[32] The factors which indicated bad faith were the successive filings, the fact that the debtor was originally not able to meet the jurisdictional limits of Chapter 13, and the fact that upon filing the Chapter 13 petition 12 days after the conclusion of the Chapter 7, the only debt listed was that which was nondischargeable in the Chapter 7. The court concluded that the plan was proposed in bad faith because the Chapter 13 filing "was a manipulation of the bankruptcy system in order to discharge a single debt for de minimis payment under a Chapter 13 plan which was ruled nondischargeable under an immediately previous Chapter 7 filing, when the debtor could not originally meet the jurisdictional requirements of Chapter 13."[33]

Amicus submits that the absence of Curtis Reed Johnson's good faith is established a matter of law by the filing of a Chapter 20 proceeding in which the only debts to be addressed by the Chapter 13 plan are liens surviving the previous Chapter 7 proceeding where there was no change in the debtor's financial circumstances between the filing of the two petitions for bankruptcy relief.

CONCLUSION

Amicus curiae, the Kansas Bankers Association, respectfully urges this Court to affirm the United States

[31] *Matter of Metz*, 820 F.2d 1495, 1498 (9th Cir. 1987).

[32] *In re Rasmussen*, 888 F.2d at 703.

[33] *Id.*, 888 F.2d 706.

Court of Appeals for the Tenth Circuit under the Code definition analysis adopted by that Court or under the alternative good faith criteria of 11 U.S.C. §1325(a)(3). Kansas banks, like other creditors, enter into loan transactions secured by real property with an expectation that debtors will not be allowed to manipulate the Bankruptcy Code to frustrate the creditors' contractual right to apply the value of the collateral to satisfy the loan obligation. If the Tenth Circuit's holding is reversed, Johnson will have achieved a goal not intended by Congress when enacting the Bankruptcy Code.

Respectfully submitted,

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QUESTION PRESENTED

Whether the terms "debt" and "claim" as defined at 11 U.S.C. section 101(11) and 11 U.S.C. section 101(4), respectively, encompass the *in rem* portion of a secured debt which remains due after the discharge in a prior bankruptcy of the *in personam* portion.

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Petitioner,

v.

HOME STATE BANK,

Respondent.

BRIEF OF THE AMICUS CURIAE AMERICAN BANKERS ASSOCIATION IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE

The American Bankers Association hereby respectfully submits this brief as amicus curiae in support of the Respondent with the consent of both of the parties. The signed consents of each are filed together with this brief.

The American Bankers Association is the principal national trade association of the commercial banking industry in the United States, having as members both national and state-chartered banks, located in each of the fifty states and the District of Columbia. Member banks of the Association range from the smallest of community banks through regional, super-regional and money center banks. Collectively, our

membership holds approximately ninety-five percent of domestic assets of all American commercial banks.

This is a bankruptcy case in which, as is typical, a debtor and its amici urge this Court to construe the provisions of the Bankruptcy Code "liberally" in order to carry out its remedial intent, to "alleviate the burdens faced by low and middle income consumers" (Brief of Consumers Education and Protective Association et al., at 1), to "ameliorat[e] the human costs which arise in an economic system in which business failure, with concomitant layoffs and unemployment regularly occur" (*Id.*) and to "save the debtor's home." (*Id.* at 39).

There is another side to that coin which too often escapes notice and which the American Bankers Association wishes to bring to the attention of the Court. Bankruptcy laws do not exist solely for the purpose of protecting debtors, but also to assure that there is an equitable distribution of the debtor's assets among creditors and that there are remedies against every act by which a failing debtor seeks an unequal distribution. *Merchants' National Bank v. Sexton*, 228 U.S. 634 (1913). One of the "core functions" of a bank is to lend money. *Clarke v. Securities Industry Association*, 479 U.S. 388, 409 (1987). Banks earn an income by collecting the principal and interest on the loans they make. They lose money *only* when borrowers do not pay them back. That happens too often in the current economic environment.

Personal bankruptcy filings are at a record level—over 718,000 in 1990 alone (Administrative Office of U.S. Courts, quoted in USA Today, March 19, 1991 at 1B). Personal bankruptcies together with business bankruptcies, particularly in the real estate business

(2,225 of them in 1990[1]), have created serious stresses in many sectors of the financial intermediary industry. The problems of the thrift industry—which specializes in real estate lending, and especially in home mortgages—is familiar. Hundreds of such institutions have failed, hundreds more are insolvent or so poorly capitalized that they are unlikely to survive. The federally operated deposit insurance fund created to protect depositors in such institutions has proved inadequate to the task, and has required and will continue to require regular infusions of the taxpayers' money, ultimately measured in hundreds of billions of dollars, to cure the problem.[2]

The commercial banking industry, though somewhat less affected, has also experienced difficulties, regionally, in the real estate lending market because they are not repaid their loans. There were 169 bank failures in 1990,[3] but there have been other repercussions of a declining market as well. Surviving banks have been under great pressure, both internally and from federal regulatory authorities, to cut costs. This has resulted in thousands of job losses in the industry.[4] Similar pressures have been experienced by

[1] Kleege, *Bankruptcies Burgeon Among Banks' Real Estate Clients*, American Banker, March 19, 1991 at 8.

[2] Thomas, *Senate Approves $78 Billion Measure For the Cleanup of Insolvent Thrifts*, Wall St. J., March 20, 1991 at A2.

[3] Bacon, *Bruised by the S&L Fiasco, Lawmakers Now Try to Show They Are Born Again Bank Guardians*, Wall St. J., March 19, 1991 at A26.

[4] *See, e.g.*, Rose, *Bankers' lost innocence: Job security is vanishing*, Crain's Chicago Business, March 18-24, 1991.

the industry to tighten credit standards,[5] especially in the real estate lending market, so much so that prospective borrowers who would otherwise have qualified for mortgages recently have not been able to do so.[6]

Even credit unions suffer from unrepaid loans. Approximately five hundred federally insured credit unions, with over $8 billion in assets are either insolvent or inadequately capitalized.[7]

It is therefore all very well and good to be sympathetic to borrowers who, through no fault of their own, become unemployed, unable to pay their debts, and whose homes are therefore at risk. But some sympathy should be reserved as well for former bank employees who became unemployed, through no fault of their own, when too many borrowers failed to repay their loans; some sympathy should be reserved for taxpayers who, through no fault of their own, will end up—one way or the other—paying the bills left unpaid by defaulting borrowers; some sympathy should be reserved for prospective homeowners who, through no fault of their own, never get a chance to acquire a mortgage because mortgages are too risky: Too many people do not repay them. Non-debtors (non-parties to this action) have such countervailing considerations which need to be represented here. It

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[5] Nadler, *America Is Paying the Price Of Mixed Signals to Bankers*, American Banker, January 2, 1991 at 4.

[6] Roosevelt, *Mortgage Crunch May Be Looming, Analyst Warns*, American Banker, March 25, 1991, at 1.

[7] Rehm, *Agency Faulted in Handling of the Industry's Wounded*, American Banker, March 19, 1991 at 11.

is the interest of the American Bankers Association, on behalf of its members, to do so.

SUMMARY OF THE ARGUMENT

This is a fairly straightforward case of application of plain language of the relevant statute. The debtor, Petitioner in this case, received a discharge in a Chapter 7 bankruptcy proceeding. As a consequence of that, his creditors no longer had any "claim" against him as that term is defined in the Bankruptcy Code, and therefore there was nothing to be re-scheduled in a subsequent Chapter 13 proceeding. The Petitioner's reading of the plain language to the opposite effect is premised upon a faulty understanding of the nature and effect of foreclosure proceedings. When the true nature of these is properly understood, it becomes apparent that the Respondent bank in this case seeks merely to realize and benefit from its own property interest, and not pursue a nonexistent "claim" against the debtor.

ARGUMENT

The Statutory Scheme

Chapter 13 of the Bankruptcy Code sets forth a procedure whereby natural persons may receive protection from creditors by means short of liquidation. The "plans" which are provided for in Chapter 13 may designate a class or classes of unsecured "claims," modify the rights of holders of secured "claims" and provide for payments on "claims." 11 U.S.C. § 1322(b). A plan is to be confirmed if it provides that a proper value is paid on account of each unsecured "claim" and proper treatment is provided

with respect to each secured "claim". 11 U.S.C. § 1325(a).

The term "claim" is defined in the Code as either a "right to payment" or a "right to an equitable remedy for breach of performance *if such breach gives rise to a right to payment*." 11 U.S.C. § 101(4) (Emphasis supplied). A "claim" against a debtor includes a claim against the property of the debtor. 11 U.S.C. § 102(2).

When a debtor has received a discharge pursuant to 11 U.S.C. section 727, as is the case here, the effect of that discharge is to void any judgment and enjoin any efforts to enforce the personal liability of the debtor with respect to any debts discharged. 11 U.S.C. § 524. The term "debt" is defined as liability on a "claim." 11 U.S.C. § 101(11).

Under this statutory scheme, it is obvious and undisputed that the Bank has no right to payment *from the debtor*. Such rights as the bank may have had were clearly extinguished by the Chapter 7 proceeding three years before the filing of the Chapter 13 proceeding. If there is no right to payment from the debtor, then there is no "claim" to be covered by the subsequent Chapter 13 plan. The Tenth Circuit so held. *Home State Bank of Lewis v. Johnson*, 904 F.2d 563, 566 (10th Cir. 1990). The court was clearly correct, and its decision should be affirmed. We carry the analysis a step further, however, and examine into the question whether the Bank retains a *right* to payment from someone other than the debtor or a *right* to payment from the property of the debtor and whether that makes any difference.

Right to Payment

The Brief for the Petitioner, at 17-21, argues that the statute speaks only of a "right to payment"; it does not contain the words "right to payment from the debtor." That being the case, the Brief argues, it was wrong for the Tenth Circuit to have engrafted those words onto the statutory phrase. The Brief then goes on to allege that there are sources of payment to the Bank other than the debtor—such as the highest bidder at the sheriff's sale.

It is ironic that the Petitioner criticizes the Tenth Circuit for adding to the statute words that are not there, for in making this argument, the Petitioner deletes from the statute words that *are* there. The argument wrongfully equates a "payment" with a "right to payment,"[8] and likewise flies in the face of the facts present in this case.

In this case, the Bank foreclosed on its mortgage. By common understanding, a foreclosure is a "proceeding for the legal determination of the existence of the mortgage lien, the ascertainment of its extent, and the *subjection* to a sale of the estate pledged for

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[8] This Court has recognized the distinction quite clearly. In *Board of Governors of the Federal Reserve System v. Dimension Financial Corporation*, 474 U.S. 361, 368 (1986), for example, the Bank Holding Company Act defined "bank" as an institution which, among other things, accepts deposits that the depositor has the legal right to withdraw on demand. The Federal Reserve adopted a regulation seeking to include within this statutory term so-called NOW accounts which were, as a matter of practice, paid on demand. This Court disallowed the regulation: "[N]o amount of agency expertise—however sound may be the result—can make the words 'legal right' mean a right to do something 'as a matter of practice.' "

its satisfaction." 55 Am. Jur. 2d *Mortgages* ¶ 553. (Emphasis supplied). To the extent that a mortgage holder may acquire a *right* to payment, it is a right which arises only from an actual sale. A "foreclosure" would not give a mortgage holder a *right* to payment if, for example, there were no bidders at all, or if the cognizant court declined to confirm the sale, perhaps due to inadequacy of the bids. *See, e.g., Ballentyne v. Smith*, 205 U.S. 285, 291 (1907). No *right* to payment accrues to the mortgage holder—indeed, no payment at all—where the mortgage holder itself is the highest and best bidder at the sheriff's sale. That is what occurred here—twice. Home State Bank was the high bidder at the sheriff's sale in December, 1985 (Brief for the Petitioner at 5) and at the sheriff's sale in November, 1990 (Brief for the Petitioner at 12).[9] The completion of either such "sale" would not have constituted a "payment" to the Bank unless it is held, implausibly, that the Bank has made a "payment" *to itself*, which somehow constitutes the "payment" contemplated by the Bankruptcy Code. It is even more implausible to allege that the actual foreclosure proceeding which took place here somehow created an enforceable *right* of the Bank *as against itself* to compel such a "payment". The long and short of it is that a third-party bidder at a sheriff's sale *could* make a payment to the Bank for the property; the debtor *could* redeem the property; a third-party purchaser, sometime after the sheriff's sale, *could* repurchase the property from the Bank and make a payment to it, but the Bank has no *right* to require that any of

[9] Neither "sale" was actually consummated due to the continuing litigation of which the argument before this Court is the most recent chapter.

these things happen. If the Bank concededly has no right to payment from the debtor, then there is no other identifiable person or entity from whom it has a right to payment, and, therefore, no right to payment at all.

The Brief for the Petitioner also suggests, at 18, that "[t]he payment *could* be made by transferring the debtor's property to a creditor" (emphasis supplied), and that a mortgage or other security interest is intended to provide "an alternate means of payment if the debtor is either unwilling or unable to otherwise pay [sic] the debt" *Id.* at 19. This argument, to the effect that the Bank has a right to payment from the property of the debtor, suffers from the same infirmity as outlined above: What *could* be done is a far cry from what a Bank has a *right* to require. But there are other infirmities as well.

Under the statutory scheme outlined above, a debt is a liability on a claim and a claim is a right to payment. Obviously, therefore, there must be some relationship of the "payment" to the "debt." The Petitioner even goes so far as to assert the validity of this proposition in his quotation of the *Black's Law Dictionary* definition of "payment". It is

> a delivery of money *or its equivalent* in either specific property or services by one person *from whom it is due* to another person *to whom it is due . . . for the purpose of extinguishing debt.*

Brief for the Petitioner at 19 (citing BLACK'S LAW DICTIONARY 1016 (5th ed. 1979)).

Under that definition, urged upon this Court *by the Petitioner*, what has occurred in this case cannot pos-

sibly be described as a payment, since there is no one "from whom it is due," the debtor having been discharged; there is no one "to whom it is due" and there is no "debt" to be extinguished, since the Chapter 7 proceeding voided the Bank's ability to enforce the liability against the debtor.

In addition, the foreclosure of a mortgage is a means whereby the Bank may realize *its own* property interests. While it is clear under Kansas law that the mortgage conveys no title to the real property in question in and of itself, it is equally clear that a farm mortgage itself is a valuable property right of the Bank, recognized and protected as such under the Fifth Amendment to the Constitution. *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 590-91 (1935).

Moreover, the "property" is not necessarily the equivalent of money, as required by the Petitioner's own definition of "payment." As indicated above, a foreclosure proceeding includes an ascertainment of the extent of the lien. But if the "property" is "equivalent" to that ascertained amount, it it merely coincidental. Foreclosure of a mortgage may or may not make the Bank whole in any given case. If a bank recovers less than the full value of its outstanding credit, under ordinary circumstances it would be entitled to a deficiency judgment for the balance. That is obviously not so here. There are even circumstances in which a foreclosure results in negative value to the bank. A bank which acquires title to property by foreclosure may inadvertently find itself liable for the costs of cleaning up the environmental damage to that property under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 at

a cost in excess of the value of that property. *See, e.g. United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3481 (U.S. January 14, 1991). On the other hand, a bank may take title by submitting the best bid at the sheriff's sale, hold the property essentially in fee simple for a time and then sell it as would any other owner, and retain the excess, if any, over the outstanding balance of its credit. So while ordinarily, a "payment" on a debt either reduces or eliminates the debt, there is no such effect here, no necessary relation between the debt and the so-called "payment." What actually happens during and after a foreclosure is thus so far disconnected from the "debt" itself, particularly in a bankruptcy situation, that the foreclosure could not reasonably be construed as the taking of a "payment" in the form of the "debtor's" property.

CONCLUSION

For all of the reasons set forth herein and in the Brief for the Respondent, the American Bankers Association hereby respectfully urges the Court to affirm the decision of the Tenth Circuit below.

Respectfully submitted,

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